

ZoomInfo Shareholder Sues Over Customer Churn Following Pandemic

By Matthew Bultman 2024-09-05T14:07:07Z000-04:00

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** [3:24-cv-05739](#)

ZoomInfo Technologies Inc. was sued by a shareholder who alleges the software provider misled investors about its revenue and hid customer churn.

ZoomInfo reported record financial results during the Covid-19 pandemic, as businesses emphasized digital sales and marketing, the lawsuit said. But after the initial wave of demand abated, numerous customers attempted to reduce their use or, in some cases, abandon the product, the suit said.

The investor accused ZoomInfo of using “manipulative and coercive” auto-renewal policies, as well as litigation threats, to stem the flow of its exits. That created a hidden demand cliff for future contract renewals, said the [suit](#), filed Wednesday in the US District Court for the Western District of Washington.

“The tactics also burned ZoomInfo’s reputational capital, eroded the Company’s customer franchise, and placed the Company at a competitive disadvantage as compared to new market entrants,” the proposed class action said.

ZoomInfo’s share price has been on a downward trend since climbing over \$77 per share in November 2021, according to Bloomberg data.

It bottomed out around \$8 last month after ZoomInfo said, among other things, it was incurring a \$33 million charge related to nonpayments by its customers and that its chief financial officer, Cameron Hyzer, would be leaving the company, the suit said.

The lawsuit said the decline has cost shareholders billions. Meanwhile, company insiders, including Hyzer and CEO Henry Schuck, were able to dump “ZoomInfo stock at artificially inflated prices before the truth was revealed,” the suit said.

ZoomInfo didn't immediately respond to a request for comment.

Robbins Geller Rudman & Dowd LLP, AsherKelly, and Keller Rohrback represent the investor.

The case is [City of Pontiac Police and Fire Retirement System v. ZoomInfo Technologies Inc](#) , W.D. Wash., No. 24-cv-05739, 9/4/24 .

To contact the reporter on this story: Matthew Bultman in New York at mbultman@bloombergindustry.com

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com

Branson Dumped \$1 Billion in Stock on Space Hype, Suit Says (2)

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- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0895

By Mike Leonard

(Bloomberg Law) --

Richard Branson exploited bogus hype about the capabilities of Virgin Galactic Holdings Inc.'s spacecraft to make \$1 billion worth of illegal insider stock sales, an unsealed lawsuit says.

A shareholder sued the British industrialist, saying he spent years misleading the public about the readiness of Virgin Galactic's flagship space tourism vessel, the Unity, then dumped "massive portions of his stock" across 2020 and 2021. The sales included \$300 million in August 2021, before the public learned his own trip to space almost ended in disaster, according to the lawsuit, which also targets other board members.

"Despite the near misses, loss of life, and questionable safety record, Branson was determined to be the first billionaire in space" so he could "secure billionaire bragging rights" and try to bail out a travel business empire that lost nearly \$1.9 billion during the Covid-19 pandemic, the suit says.

He was especially keen on beating out Amazon.com Inc. founder Jeff Bezos, who runs the rival space venture Blue Origin LLC, according to the court complaint. Bezos is the world's second-wealthiest person, with a net worth of \$199.7 billion, according to the Bloomberg Billionaires Index. Branson's \$3 billion net worth puts him outside the top 500.

Branson made it into Earth's sub-orbit on July 11, 2021, nine days before Bezos became the first to cross the traditional boundary of outer space. After arguably winning the billionaire space race, "Branson sold every share he could," the lawsuit says.

Branson and Virgin Galactic disputed the court claims in separate statements Wednesday.

"The allegations are entirely without merit, and we will address them in the appropriate forum," the company said. Branson also called the claims meritless through a spokesperson, saying he would "vigorously defend against them."

The company is the only one of the three largest commercial space ventures—each founded by a

high-profile billionaire—that trades publicly. It’s also the only one that relies on human crews, according to legal filings. The others, Blue Origin and Elon Musk’s Space Exploration Technologies Corp., are owned by their founders and private investors.

‘Branson Profiteered’

According to the shareholder suit, Branson signaled publicly in mid-2019, a few months after Unity spun out during a test flight, that the company had only minor technical hurdles to overcome before it could take on passengers. Two years later, he publicly described his own trip to space as a wild success.

But he knew both flights and other earlier efforts had suffered “potentially catastrophic” technical failures that nearly led to fatalities, according to the complaint made public Tuesday. Branson allegedly hid that information between May 2020 and August 2021 while selling every Virgin Galactic share he held except for those restricted by stock lockup agreements.

His \$1 billion in insider stock sales made him hundreds of millions in illicit profits before the company’s problems became public, sending its market value tumbling, the lawsuit says. “In stark contrast to Virgin Galactic, Branson profiteered from his wrongdoing,” according to a court filing submitted with the lawsuit.

The case involves shareholder derivative claims, which are technically brought on a corporation’s behalf against its leaders or owners. Damages in derivative cases are typically paid into a company’s coffers by its officers, its directors, its controlling stockholders, or their insurers.

The fiduciary breach allegations echo an ongoing securities fraud suit filed in a federal court in Brooklyn by a different investor. The new lawsuit was originally filed under seal Aug. 27 in Delaware’s Chancery Court.

The investors leading the case are represented by Robbins Geller Rudman & Dowd LLP and Robbins LLP. Branson and the other board members haven’t yet made court appearances.

The case is *Espinosa v. Branson*, Del. Ch., No. 2024-0895, complaint unsealed 9/3/24.

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloombergindustry.com

(Updates Sept. 4 story with Branson statement in sixth and seventh paragraphs.)

Software Development Platform Hit with AI-Related Securities Suit

K [dandodiary.com/2024/09/articles/artificial-intelligence/software-development-platform-hit-with-ai-related-securities-suit](https://www.dandodiary.com/2024/09/articles/artificial-intelligence/software-development-platform-hit-with-ai-related-securities-suit/)

September 5, 2024



By Kevin LaCroix on September 5, 2024

Posted in Artificial Intelligence



SEC officials have for months been signaling their concerns about companies overstating their AI credentials, a phenomenon that the officials and others have called “AI washing.”

As set out and partially transcribed in a

September 5, 2024, *TheCorporateCounsel.net* post ([here](#)), SEC Chair Gary Gensler recently recorded a video in which he reiterated concerns about public company AI-related disclosures and the need for companies to match AI-related claims to their actual capabilities. Nor are concerns about companies’ AI-related disclosures limited to the SEC; the tech community is also concerned about companies that overhype their AI qualifications, as illustrated in a September 4, 2024 *TechBrew* post ([here](#)).

Another audience is also monitoring public companies’ AI-related disclosures – the class action plaintiffs’ lawyers. The number of securities class action lawsuits based on allegedly misleading statements concerning AI continues to grow. In the latest example, on September 4, 2024, a plaintiff shareholder filed a securities suit against software development platform GitHub alleging that the company misled investors by overstating the company’s ability to develop AI software features that would increase market demand for the company’s software development platform. A copy of the complaint can be found [here](#).

Background

GitHub is a web-based platform that helps companies develop and deploy software. According to the complaint, in connection with its revenue projections for fiscal year 2025, the company included in its projection disclosures statements about the company’s incorporation of AI throughout its DevSecOps platform. These statements included representations about how the company’s development of AI features would increase software development efficiency, making it more affordable for customers, as a way for the company to monetize its various AI capabilities.

The complaint alleges that these statements about the company's AI-related initiatives "created the false impression that" the company "possessed reliable information pertaining to the Company's ability to develop and incorporate AI throughout the software development cycle in order to optimize code generation thereby increasing market demand." In truth, the complaint alleges, there was "weak market demand for Gitlab's touted AI features," and the company was incurring increased expenses involving its China joint venture, JiHu.

The complaint alleges that "the truth emerged" on March 4, 2024, when the company released its first fiscal quarter 2024 earnings report. Among other things, the company announced that it needed more time to build its pipeline and close deals on new products. The company also lower its 2025 guidance. The complaint alleges that the company's share price declined 21% on this news.

The Complaint

On September 4, 2024, a plaintiff shareholder filed a securities class action lawsuit complaint in the Northern District of California against GitHub and certain of its executives. The complaint purports to be filed on behalf of a class of investors who purchased the company's securities between June 6, 2023, and March 4, 2024. The complaint alleges that the company misrepresented its ability to develop AI features that would generate code more efficiently and increase market demand for the company's platform.

The complaint alleges that the defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The complaint seeks to recover damages on behalf of the plaintiff class.

Discussion

There is no doubt that concerns about the possibility of AI-related hype is running high in many quarters. One reason to be concerned about various companies' claims concerning their AI capabilities is that these kinds of AI claims increasingly are attracting the unwanted attention of plaintiffs' lawyers.

In my recent round of the top stories in the world of directors' and officers' liability and insurance, I noted that the rise in AI-related litigation is one of the top trends in 2024. Although there were AI-related lawsuits filed prior to 2024, AI-related lawsuit filings are increasing this year. Based on the data tallied on the Stanford Law School Securities Class Action Clearinghouse website ([here](#)), this lawsuit is the 11th AI-related securities suit to be filed this year. When the time comes to count all the securities lawsuits to be filed this year, AI-related securities suit filings clearly will be a significant factor in the total number of suits filed.

The transformation anticipated from the arrival of AI technology may still be underway, but the litigation is already here. I suspect that as the year progresses, we will see more lawsuits like this one. I am also going to go out on a limb here; I predict that before year-end, we will see the first AI-related SEC enforcement action filed against a reporting company. Behind these predictions are the pervasive concerns about companies' AI-related disclosures.

Carl Icahn, Board Members Sued Over Investment Firm Margin Loans

By Martina Barash

Documents

-  [Complaint](#)
-  [Docket](#)
-  [Judge Rodolfo A. Ruiz II](#)
-  [Icahn Enterprises LP](#)

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- **COURT:** S.D. Fla.
 - **TRACK DOCKET:** [No. 1:24-cv-23390](#)

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Carl Icahn, Board Members Sued Over Investment Firm Margin Loans

By Martina Barash 2024-09-04T17:15:18000-04:00

- **COURT:** S.D. Fla.
- **TRACK DOCKET:** [No. 1:24-cv-23390](#)

Carl Icahn and other board members of Icahn Enterprises LP and its affiliates are responsible for harm to the investment firm stemming from the billionaire's allegedly undisclosed personal margin loans, according to a new derivative suit.

Icahn Enterprises sustained reputational damage as well as the costs of defending several securities class actions and settling Securities and Exchange Commission charges, investor Harvey Gitlin says on behalf of the company. He filed his suit Wednesday in the US District Court for the Southern District of Florida.

The harm came from the directors' nondisclosure of Icahn's \$3.7 billion worth of margin loans; an "an undisclosed scheme to use heightened dividend yields as an inducement to buoy or inflate the trading price" of Icahn Enterprises' depositary units; and a practice of "using money taken in from new investors to pay out dividends to old investors," as alleged in a 2023 short-seller report, Gitlin says.

A proposed class action filed shortly after publication of the Hindenburg Research report remains pending in the Southern District of Florida.

Meanwhile, an SEC probe found that Icahn didn't properly disclose how much he was borrowing against his stake in the company. On Aug. 19, the commission announced a \$2 million settlement with Icahn and his firm, with Icahn to pay \$500,000 and the company to pay \$1.5 million. Icahn and Icahn Enterprises didn't admit to or deny the SEC's findings, but they agreed to cease and desist from future violations, the agency said.

Gitlin seeks damages and corporate governance reforms on his claims of breach of fiduciary duty and contribution.

Icahn Enterprises didn't immediately respond to a request for comment submitted through its website.

Jose Sosa, who practices in Palm Beach Gardens, Fla., and Federman & Sherwood represent Gitlin.

The case is Gitlin v. Icahn , S.D. Fla., No. 1:24-cv-23390, complaint 9/4/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloombergindustry.com

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Six Flags Agrees to Settle Investor Class Claims for \$40 Million

By Martina Barash

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Six Flags Agrees to Settle Investor Class Claims for \$40 Million

By Martina Barash 2024-09-04T18:11:07Z000-04:00

Six Flags Entertainment Corp. has agreed to a \$40 million class settlement with investors who say it misrepresented the progress of theme park projects in China, according to a federal court filing.

The proposed deal merits preliminary approval because it's fair and reasonable, the investors told the US District Court for the Northern District of Texas on Tuesday.

- The settlement comes after the US Court of Appeals for the Fifth Circuit revived the suit for a second time in April, saying the lower court misapplied principles outlined in the previous appellate opinion
- Two pension funds alleged that Six Flags and its executives misleadingly said the Chinese theme parks' development was progressing well, and the funds said its stock later lost about half its value over the period when the company finally announced delays and negative financial impacts related to the projects
- The "maximum potential damages that could realistically be established would be between approximately \$370 million and \$470 million," the investors said in their new filing

Bernstein Litowitz Berger & Grossmann LLP is lead counsel for the pension fund and the proposed class. Cantey Hanger LLP and Skadden Arps Slate Meagher & Flom LLP represented Six Flags.

The case is Okla. Firefighters Pension & Ret. Sys. v. Six Flags Ent. Corp. , N.D. Tex., No. 4:20-cv-00201, motion 9/3/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloombergindustry.com

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<https://www.law.com/texaslawyer/2024/09/05/10-principles-that-will-guide-the-new-texas-business-courts-in-breach-of-fiduciary-duty-litigation/>



NOT FOR REPRINT
COMMENTARY

10 Principles That Will Guide the New Texas Business Courts in Breach of Fiduciary Duty Litigation

"Below are 10 principles that will guide the Texas business courts in breach of fiduciary duty litigation against corporate directors," write Baker Botts' Tom O'Brien, John Lawrence and Monica Smith.

September 05, 2024 at 01:00 PM

Securities Litigation

By Tom O'Brien, John Lawrence and Monica Smith | September 05, 2024 at 01:00 PM



The new Texas business courts recently opened their doors on Sept. 1, 2024 in Dallas, Fort Worth, Austin, San Antonio, and Houston. The courts have jurisdiction concurrent with district courts over, among other cases, actions alleging that a corporate director breached a duty owed to the corporation, generally subject to a \$5 million minimum amount in controversy, unless a party to the action is a publicly traded company (in which case there is no minimum amount in controversy). Tex. Gov't Code Sections 25A.004(b)(5), (c). Unlike the Delaware Court of Chancery, the Texas business courts do not have the benefit of dozens of precedent-setting opinions in breach of fiduciary duty litigation from the state's court of last resort in civil matters. But this area of the law is not completely uncharted in Texas. Below are 10 principles that will guide the Texas business courts in breach of fiduciary duty litigation against corporate directors, as well as a few questions that the courts may address in their early days.

1. Tripartite Duties

Under Texas law, corporate directors owe three fiduciary duties to their corporation: loyalty, obedience, and due care. *In the Matter of Estate of Poe*, 648 S.W.3d 277, 287 (Tex. 2022); *Gearhart Indus. v. Smith Int'l*, 741 F.2d 707, 719 (5th Cir. 1984). While these duties are not expressly defined in the Texas Business Organizations Code (TBOC), they are recognized in case law, and the statute creating the business courts expressly references actions for "breach of a duty of loyalty or good faith." Tex. Gov't Code Section 25A.004(b)(5).

2. Duty of Loyalty

The duty of loyalty requires a director to act in good faith and not allow his or her personal interests to prevail over the corporation's interests. *Gearhart*, 741 F.2d at 719. A corporation's charter cannot exculpate claims for breach of this duty. Tex. Bus. Orgs. Code Section 7.001(c).

To prove a breach of the duty of loyalty, a plaintiff must show that a director was "interested" in a particular transaction. *Gearhart*, 741 F.2d at 719. Under Texas common law, a director is interested in a transaction if he or she (i) makes a personal profit from the transaction by dealing with the corporation; (ii) usurps a corporate opportunity; (iii) buys or sells assets of the corporation; (iv) transacts business in his or her director capacity with a second corporation of which he or she is also a director, officer, or significantly associated; (v) transacts business in his or her director capacity with a family member; or (vi) takes actions in response to a takeover threat with the sole or primary goal of entrenching

themselves as a director. *A. Copeland Enters. v. Guste*, 706 F. Supp. 1283, 1290–91 (W.D. Tex. 1989). The TBOC provides that, for purposes of the Code, a director is disinterested with respect to the approval of a transaction if the director or the director’s associate (i) is not a party to the transaction, and (ii) does not have a material financial interest in the outcome of the transaction. Tex. Bus. Orgs. Code Section 1.003(a).

If a plaintiff shows that a director was interested in a transaction, the burden shifts to the director to show that he or she acted in good faith (i.e., he or she intended to benefit the corporation), and that the transaction was fair to the corporation (i.e., it carries the earmark of an arm’s-length bargain). *Gearhart Indus.*, 741 F.2d at 720, 723; see Tex. Bus. Orgs. Code Section 21.418(b)(2) (a director will not be liable for breach of the duty of loyalty with respect to an interested-director transaction if the transaction is fair to the corporation when it is authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the shareholders). “The standard of loyalty is measured by no fixed scale,” *Imperial Grp. (Texas) v. Scholnick*, 709 S.W.2d 358, 365 (Tex. App.—Tyler 1986, writ ref’d n.r.e.) (quotations omitted), but directors may be able to prove the good faith and fairness of a transaction by showing, among other facts, that they had credible business reasons for the transaction, hired well-respected financial experts and counsel to aid them, followed their advisors’ advice, negotiated at arm’s length with sophisticated businesspeople on both sides of the transaction, and/or obtained comparable terms to other comparable transactions. *Gearhart Indus.*, 741 F.2d at 723.

The TBOC also sets forth procedures that, if followed, protect directors from liability for breach of the duty of loyalty in connection with interested-director transactions. Neither the corporation nor any of the corporation’s shareholders will have a cause of action against a director for breach of the duty of loyalty with respect to an interested-director transaction if the director discloses the material facts of the transaction and a majority of the shareholders or a majority of the disinterested directors on the board or a committee of the board approve the transaction. Tex. Bus. Orgs. Code Sections 21.418(b), (e).

3. Duty of Obedience

The duty of obedience forbids illegal or ultra vires acts—acts outside the scope of the corporation’s powers as defined by its charter or applicable law. *Gearhart Indus.*, 741 F.2d at 719; *In re Life Partners Holdings*, Case No. DR-11-CV-43-AM, 2015 WL 8523103, at *16 (W.D. Tex. Nov. 9, 2015); see also Tex. Bus. Orgs. Code Section 20.002 (addressing ultra vires acts). Applying Texas’s business judgment rule, however, courts have refused to impose personal liability on exculpated disinterested directors for breach of this duty unless the directors committed or approved an illegal act with actual knowledge of its illegality. See *Gearhart Indus.*, 741 F.2d at 719 (“An ultra vires act, negligent or not, may be voidable under Texas law, but the director is not personally liable for it unless the action in question is also illegal.”); *In re Life Partners Holdings*, 2015 WL 8523103, at *16 (“If a disinterested director approves a corporate act that violates positive law with actual knowledge of its illegality, he is liable for breach of fiduciary duty, which, as a knowing violation of law, cannot be exculpated.”) (quotations omitted); *Resolution Trust v. Norris*, 830 F. Supp. 351, 357 (S.D. Tex. 1993) (that acts are illegal does “not make directors liable for the results, absent pleading and proof that the directors knew about the illegal conduct”); see Tex. Bus. Orgs. Code Section 7.001(c)(2)(B) (the liability of a director cannot be eliminated or limited to the extent the director is found liable for an act or omission not in good faith that involves a knowing violation of the law). If a director is accused of breaching the duty of obedience by committing an ultra vires act, the director may also be able to raise as a defense the broad scope of the corporation’s powers, if the corporation’s charter provides that the corporation is formed for any lawful purpose or purposes, as permitted by the TBOC. See Tex. Bus. Orgs. Code Section 2.001.

4. Duty of Due Care

The duty of care requires directors to manage the corporation’s affairs with diligence and prudence. *Gearhart Indus.*, 741 F.2d at 720. Directors must exercise the level of care an ordinarily prudent person would use under similar circumstances. *Id.* Under Texas’s business judgment rule, however, the negligence of a director does not constitute a breach of the duty of care if the act was within the honest exercise of his or her discretion and judgment in managing the

corporation. *Sneed v. Webre*, 465 S.W.3d 169 (Tex. 2015); *Cates v. Sparkman*, 73 Tex. 619, 622 (Tex. 1889); *Gearhart Indus.*, 741 F.2d at 721. The TBOC also provides that a director may, in good faith and with ordinary care, rely on information, opinions, reports, or statements prepared or presented by officers or employees of the corporation, legal counsel, certified public accountants, investment bankers, others with professional expertise, or a committee of the board of which the director is not a member, Tex. Bus. Orgs. Code Section 3.102, and that a corporation's charter may eliminate the liability of a director for breach of the duty of care, id. Section 7.001.

In the near future, the Texas business courts may be faced with two questions regarding the duty of care and the business judgment rule: (i) whether the business judgment rule protects gross negligence; and (ii) whether a corporation's charter provisions may exculpate claims for gross negligence. Regarding the first issue, some courts have held, mostly in the banking context, that directors can be liable for grossly negligent acts. See, e.g., *In re Life Partners Holdings*, 2015 WL 8523103, at *7; *F.D.I.C v. Harrington*, 844 F. Supp. 307, 306 (N.D. Tex. 1994). But other courts have rejected the proposition that directors can be held liable for gross negligence. See *Roels v. Valkenaar*, No. 03-19-00502-CV, 2020 WL 4930041, at *9 (Tex. App.—Austin 2020, no pet.); *Chapman v. Arfeen*, No. 09-16-00272-CV, 2018 WL 4139001, at *15 (Tex. App.—Beaumont 2018, pet. denied); *Floyd v. Hefner*, CA No. H-03-5693, 2006 WL 2844245, at *19, *24 (S.D. Tex. Sept. 29, 2006). As to the second issue, at least one court has held that the TBOC authorizes the adoption of charter provisions that exculpate claims for gross negligence. *In re Life Partners Holdings*, 2015 WL 8523103, at *9.

5. Duty of Reasonable Oversight

Either as part of the duty of care or the duty of loyalty, or as a standalone duty, some courts have held that directors also have a duty to exercise reasonable oversight over the corporation and its affairs. See id. at *10. In their early days, the Texas business courts may address (i) whether directors have such a duty, and, if so, (ii) under what circumstances liability will attach for breach of such duty, and (iii) whether such liability is exculpable. One court addressing these issues looked to Delaware law and held that directors may be held personally liable for a failure to monitor only where they intentionally fail to act in the face of a known duty to act, demonstrating a conscious disregard for their duties. Id. at *12. The court specified two situations in which directors consciously disregard their oversight responsibility: (i) when they utterly fail to implement or consciously fail to oversee a sound monitoring system (e.g., where a corporation lacks an audit committee or the committee members do not regularly attend their meetings); and (ii) when directors are alerted to, but refuse to address, an obvious sign of possible wrongdoing that requires further investigation and, potentially, corrective action (e.g., where an audit committee knows facts suggesting potential accounting improprieties but takes no action to respond to them). Id. As to the second situation, the court clarified that directors lack the scienter necessary to establish oversight liability if, based on reasonable support, they conclude that no wrongdoing had occurred and, therefore, believed in good faith that the red flags were false alarms. Id. at *14. The court also concluded that because director oversight liability entails bad faith and a breach of the duty of loyalty, such liability is not exculpable. Id. at *12.

6. Interests Directors May Consider

The TBOC provides that in discharging their duties and in considering the best interests of the corporation, “a director is entitled to consider the long-term and short-term interests of the corporation and the shareholders of the corporation, including the possibility that those interests may be best served by the continued independence of the corporation.” Tex. Bus. Orgs. Code Section 21.401(b). This statutory provision sets Texas law apart from Delaware law, which requires directors to act for the purpose of maximizing the long-term value of the corporation. *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 253 (Del. Ch. 2014).

7. Takeover Defenses

Texas courts have examined the validity of poison pills and other takeover defenses from two perspectives: (i) their validity at the time of adoption; and (ii) their continued validity in light of events after their adoption. *A. Copeland Enters.*, 706 F. Supp. at 1291. A director may be able to prove the good faith and fairness of adopting a takeover defense by showing that the defense bought the board time to negotiate for alternatives, gave the board negotiating power, and/or propped up the prices of the corporation's shares on the market. *Id.* at 1292. Subsequent events, however, may nullify the usefulness of a takeover defense. *Id.* For example, if a board that has put in place a poison pill decides that a sale of the corporation through an open sale process is in the shareholders' best interest, the board is charged with getting the best price for the shareholders and typically should remove the poison pill after the process because keeping it in place would dilute the investment of anyone triggering its provisions. *Id.*

8. Shareholders' Standing

Because a director's duties run to the corporation and not to individual shareholders or even to a majority of shareholders, claims concerning breach of a director's fiduciary duties can be brought only by a shareholder derivatively in the name of the corporation so that each shareholder will be made whole if the corporation obtains compensation from the suit. *Gearhart Indus.*, 741 F.2d at 721. Earlier decisions held that a director may owe fiduciary duties to an individual shareholder—and an individual shareholder may have an individual action against a director for wrongs done to him or her—if a contract or confidential relationship exists between them in addition to the corporate relationship. See, e.g., *Cotton v. Weatherford Bancshares*, 187 S.W.3d 687, 698 (Tex. App.—Fort Worth 2006, pet. denied). But in 2022, the Supreme Court of Texas clarified that a director's fiduciary duty in the management of a corporation is solely for the benefit of the corporation, and that a director cannot owe an informal duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder. *In the Matter of Estate of Poe*, 648 S.W.3d at 289–90.

9. Demand Requirement

In Delaware, a shareholder may bring suit derivatively in the name of the corporation, without making a pre-suit demand on the board to act, if he or she can prove that making a demand would be futile. See *Brehm v. Eisner*, 746 A.2d 244, 256–57 (Del. 2000). The same is not true in Texas, which does not recognize the principle of demand futility. *In re Schmitz*, 285 S.W.3d 451, 455 (Tex. 2009). Texas law requires pre-suit demand in all cases; a shareholder cannot avoid a demand by proving it would have been futile. *Id.* Under the TBOC, a shareholder may not file a derivative proceeding until the 91st day after he or she submits a written demand to the corporation stating with particularity the subject of the claim and requesting that the corporation act, unless the shareholder can show irreparable injury will otherwise result. Tex. Bus. Orgs. Code Section 21.553. The demand cannot be made anonymously and must meet the statute's "with particularity" requirement. *In re Schmitz*, 285 S.W.3d at 455, 458. If a majority of the independent and disinterested directors decides in good faith, after conducting a reasonable inquiry, that pursuing the claim is not in the company's best interest, any suit that has been or is filed must be dismissed. *Id.* Section 21.558(a).

10. Creditors' Standing

Directors generally stand in a fiduciary relationship to the corporation, not its creditors. *Fagan v. La Gloria Oil & Gas*, 494 S.W.2d 624, 628 (Tex. App.—Houston [14th Dist.] 1973, no writ). However, courts have recognized a narrow exception to this rule. See, e.g., *Tow v. Bulmahn*, No. 15-CV-3141, 2016 WL 1722246, at *7–8 (E.D. La. Apr. 29, 2016), *aff'd sub nom.*, 711 F. App'x 216 (5th Cir. 2017). Under what is known as the "trust fund doctrine," when a corporation is insolvent and ceases doing business, the corporation's assets become a trust fund primarily for the benefit of the corporation's creditors and directors of the corporation are placed in a fiduciary relationship to the creditors, requiring them to administer the corporate assets for the benefit of the creditors and to ratably distribute them. *Conway v. Bonner*, 100 F.2d 786, 787 (5th Cir. 1939); *Aurelius Cap. Master v. Acosta*, No. 13-CV-1173, 2014 WL 10505127, at *3–5 (N.D. Tex. Jan. 28, 2014); *Floyd*,

2006 WL 2844245, at *19, *24; *Fagan*, 494 S.W.2d at 628; see also *Lyons-Thomas Hardware v. Perry Stove Mfg.*, 24 S.W. 16, 21 (Tex. 1893) (“[T]he assets of an insolvent corporation, which has ceased to carry on business and does not intend to resume, is a fund from which all creditors, not secured by valid liens existing before the condition was fixed, have the right to be paid on terms of perfect equality. If such a fund be a trust fund, then the assets of a corporation so circumstanced are trust funds, and those whose rights and duty it is to administer such a fund are trustees”). If a director breaches that duty, creditors may sue the director for breach of fiduciary duty. *Fagan*, 494 S.W.2d at 628.

Tom O’Brien, John Lawrence, and Monica Smith *are partners of Baker Botts and members of the firm’s securities and shareholder litigation practice group.*

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EDITOR'S LETTER

Litigator of the Week (Updated) FAQs

An overview of the weekly Litigator of the Week feature.

September 01, 2024 at 07:00 PM

Editor's Letter



Ross Todd
Editor/columnist



How do I submit a nomination?

Just [email me](mailto:rtodd@alm.com) (rtodd at alm.com) a quick overview of the win and why it's significant. It also helps to include relevant court docs or other media coverage. Feel free to nominate yourself. I promise we won't think you're conceited.

When are nominations due?

Wednesdays by 5 pm ET. We decide the winner each Wednesday night.

Are there any eligibility restrictions?

Yes. The win has to have happened in the previous seven days (from Wednesday to Wednesday) and you have to be able to do a Q&A about the case. If you can't discuss the win on the record, then I'm afraid we can't feature you.

How do you pick the winner?

We look for cases with an impact, where the outcome matters to more than just the parties involved. We're impressed by high stakes, long odds, new precedents, bold strategies—and cases that are just plain interesting.

A Few Insights on How We Choose Litigator of the Week

I often tell litigators with whom I'm speaking for the first time that The Am Law Litigation Daily has four columns per week that are *not* the Litigator of the Week just to put things in perspective.

So, it's with some hesitation today that I'm putting an additional spotlight on LOTW on one of the four days when I'm not chopping it up with the week's winners or digesting the runners-up and shout outs.

If the size of my "Litigator of the Week" email folder is any indicator, the feature doesn't need much more attention than it already gets. Clearly, many of you care about Litigator of the Week. I do, too. I take the decision the team and I make each week very seriously. And after having been the lead LOTW judge for nearly two years now, I have some thoughts

about what's working and what might need some work in the process, both on your end and mine.

I've been discussing my ideas up in conversations I've had with some of you of late. In interest of fairness and having us all on the same page, I thought I would share those thoughts in column form.

Here goes.

Please Don't Wait Until Deadline

Listen. I know how litigators operate. Your internal clocks are set based on deadlines. If a court is going to give you until midnight to file a particular motion or a response, many of you take every single second you can to perfect your arguments, language and spacing before getting it in.

Here's the thing: We here at The Litigation Daily are not a court of law. Even a court with a statutory deadline for responding to your motion is going to have days and possibly weeks to chew on your arguments. The Litigation Daily is a journalistic enterprise with a constantly rolling daily deadline. And the deadline for Litigator of the Week entries lands at 5 p.m. ET each Wednesday, right in the middle of our regular daily column cycle. Given the way the schedule falls, we choose a winner, draft questions for the Q&A, and get them out the door while simultaneously wrapping up the column you read on Thursday morning.

Please keep that in mind.

The truth is, given how closely I watch the litigation news cycle throughout the week, I often have a pretty good idea of who the top contenders are hours, and sometimes days, before that deadline. To get a better handle on those top cases, I've been reading the news clips, diving into the dockets, vetting the nominations with colleagues, and chewing on the decision as the deadline approaches. If you're just making me aware of a case for the first time at 4:45 p.m. ET on a Wednesday — especially if it's a result that landed days beforehand that's novel, precedential or outstanding — you're doing yourself a disservice.

I understand that getting client sign-off on participating in the whole nomination process can be tricky and take time, especially when it comes getting the go-ahead to participate in the Q&A necessary to compete for the top spot. But I would suggest that something as simple as passing along a copy of a decision or a link to prior media coverage, with a note saying "we're considering nominating this one for Litigator of the Week" would allow the team and me more time to get up to speed on a case. The more time we have to sit with a litigation result, review the briefs and the transcripts that went into achieving that result, the better it is for your nomination. If you ultimately hold off submitting a nomination, we won't hold it against you.

One more thing on this point: I've heard through the grapevine that some firms wait to submit a nomination to try to make sure they don't have a result that might make a stronger candidate land later in the weekly cycle. That's wrong-headed. Let me tell you why: There's no cap on a single firm's nominations. I'm not shy. I'll let you know if you're flooding me with results that aren't quite on par with the competition.

By All Means, Please Talk to My Colleagues About Your Win

This has happened a handful of times: A big patent litigation result lands and a firm reaches out to me to ask me if talking to my colleague Scott Graham would take them out of the running for Litigator of the Week.

My response is usually something along the lines of "Are you kidding me?"

If you send a patent litigation result my way, you better bet I'm going to track down Scott to talk shop and get his thoughts on the result. I'd be negligent not to. The same goes with Amanda Bronstad and any result coming out of the world of mass torts and class actions. Or a result coming out of any of the regions where I have a colleague who sits on

our national litigation desk. Part of my vetting process is reaching out to beat reporters who are covering the dockets, hearings and trials that yield these results to get their impressions of a particular decision and the lawyering that went into making it happen.

How could *not* talking to those folks be to your benefit?

Sharing Credit Is a Strength, Not a Weakness

If co-counsel or a co-party got the same result you did, let me hear about it. Our vetting process is going to suss that out anyway. It'll only raise more questions about your nomination if you don't raise their contributions in the first place.

In a case where multiple lawyers or law firms come together to achieve a result, it's worth considering pitching jointly. Our general rule is to limit nominations to just three lawyers, but we've made exceptions to that rule in cases where firms came to us as a group. Two examples immediately come to mind: We recognized the trial teams at **Kirkland & Ellis, Hueston Hennigan, O'Melveny & Myers** and **Morgan, Lewis & Bockius** who scored a bench trial win last year in state court in California for drug companies facing claims related to the opioid crisis. And just last week, we recognized the defense teams who represented five poultry company executives who beat criminal antitrust charges after two mistrials.

There are also clearly cases where some lawyers deserve more credit than others for a particular result. If you think that's the case for you, spell it out explicitly. What did you and your firm do that led to the result? Why might you deserve more credit than your co-counsel or the co-party? If you don't come out and tell me, I'm going to ask anyway.

All that said, we're always looking for feedback on the process. What's working and what needs work from your perspective? What else do you want to know about the LOTW process? Feel free to touch base with me via email at rtodd@alm.com.

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Wall Street Giants in Crosshairs Over Broker Cash Sweep Accounts

By Matthew Bultman

Deep Dive

-
- Several proposed class actions filed in recent weeks
 - Wells Fargo, others banks also facing SEC investigations

Bloomberg Law News 2024-09-05T10:24:05038212315-04:00

Wall Street Giants in Crosshairs Over Broker Cash Sweep Accounts

By Matthew Bultman 2024-09-05T05:00:02000-04:00

- Several proposed class actions filed in recent weeks
- Wells Fargo, others banks also facing SEC investigations

Legal scrutiny is mounting for Wall Street powerhouses including JPMorgan Chase & Co. and Wells Fargo & Co. over allegations they shortchanged millions of clients in their handling of idle cash.

Customers have filed proposed class actions against several big banks and their broker affiliates over “cash sweep” accounts in recent weeks, including an Aug. 28 suit targeting Charles Schwab Corp. The Securities and Exchange Commission is also investigating whether Morgan Stanley, among others, broke federal securities laws.

With a sweep program, uninvested cash in a brokerage account is transferred automatically into a higher-interest account. Numerous brokers stand accused of violating duties to act in the best interest of clients by funneling money to affiliated banks and negotiating one-sided deals that paid customers paltry interest rates.

Robert Jackson, a New York University law professor and former Democratic SEC commissioner during the Trump administration, called it a “trillion-dollar conflict of interest” that has affected retail investors around the country. The cases raise legal questions for courts and regulators, however, including what interest rate customers are entitled to.

"The economics are common sense but the law is actually more complicated than it ought to be," Jackson said during a webinar last week hosted by Bernstein Litowitz Berger & Grossmann LLP, which is investigating various financial firms over their sweep programs.

Charles Schwab previously called the suit against it a "legally unsound, copycat lawsuit." Wells Fargo, JPMorgan, and Morgan Stanley declined to comment for this story.

'Underpaid Billions'

Brokerage firms and affiliate banks make "net interest income" on the difference between the interest paid to customers and the interest the banks earn when loaning the sweep deposits, according to customer lawsuits.

That spread, the customers say, has become more pronounced as the federal funds rate—the rate at which banks lend funds to each other—has risen. As of Aug. 30, that effective rate was 5.33%, up from 2022 when it was as low as .08%.

Customers say they haven't gotten the benefit of those increases, as the interest rate that firms like Wells Fargo paid to some brokerage customers remained as low as .05%.

Collecting the spread has been profitable, plaintiffs' lawyers say. A lawsuit filed against Ameriprise Financial Inc. in August alleged it made over \$2.5 billion from its cash sweep program last year. UBS Group AG's Wealth Management Division made almost \$7 billion in net interest income, according to a lawsuit last month.

"Investors using cash sweep accounts were underpaid billions of dollars due to the drastically low interest rates paid by banks and investment firms, who profited significantly," said Adam Wierzbowski, a partner at Bernstein Litowitz.

Lawsuits have been filed against at least eight financial firms since late June, Bloomberg Law found.

Bernstein Litowitz created a task force that is looking into cash sweep practices at various financial institutions. The task force includes Jackson and Edwin Hu, a University of Virginia law professor and former SEC economist.

Legal Questions

Several lawsuits allege the brokers violated their fiduciary duty to customers by steering funds to a related entity. Fiduciary duties are also an area of focus for the SEC in its investigations, lawyers said.

Many of the lawsuits also accuse brokers of breaching contracts that promised clients a reasonable rate of interest. That raises the question of what a reasonable rate should be, lawyers said.

"That's the fundamental question that regulators are going to have to answer and so will lawyers in front of the courts as we're trying to get this money back for investors," Jackson said on the webinar.

Some banks, including Charles Schwab, Citigroup Inc., and Wachovia Corp.—now part of Wells Fargo—previously faced allegations they misled customers over their cash sweep programs. A New York federal judge dismissed the suit in 2009 after finding, in part, customers hadn't adequately alleged a breach of fiduciary duty.

About a decade later, the SEC approved a rule, Regulation Best Interest, requiring brokers to act in the "best interest" of their clients. The rule has been cited by customers suing the banks, though it's unclear how it might influence courts.

SEC Concerns

The federal funds rate's rise likely is a factor in the surge of new lawsuits. Increased scrutiny from the SEC into automatic cash sweep programs has also played a role, attorneys said.

Charles Schwab investment adviser subsidiaries agreed in June 2022 to pay \$187 million to settle SEC charges that clients were misled about hidden fees in connection with Schwab's robo-adviser product, Schwab Intelligent Portfolios.

Other firms, including Morgan Stanley and Wells Fargo, have disclosed in recent months that the SEC was investigating their cash sweep programs.

Along with potential conflicts of interest in cash sweep programs, the agency is also targeting inappropriate advisory fees, low rates of return, and liquidity concerns, said Katten Muchin Rosenman LLP litigation partner Lindsey Smith, who has represented financial services firms in regulatory probes.

The increased scrutiny could prompt changes within firms, including stronger compliance programs and enhanced disclosures, attorneys said. Some firms have already moved to raise the interest rates paid to customers on swept funds.

"The firms want to be able to offer these to their clients but obviously without running afoul of the SEC," Smith said.

To contact the reporter on this story: Matthew Bultman in New York at mbultman@bloombergindustry.com

To contact the editors responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com; Rob Tricchinelli at rtricchinelli@bloombergindustry.com

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AstraZeneca's Alexion Hit With Damages Exceeding \$130 Million

By Mike Leonard 2024-09-05T14:08:24000-04:00

- Alexion reached payment trigger, should have tried for more
- Judge ties breaches to \$39 billion AstraZeneca acquisition

An AstraZeneca Plc subsidiary is liable for more than \$130 million in damages Thursday over its lackluster efforts to commercialize a drug it acquired when it bought [Syntimmune Inc.](#) for up to \$1.2 billion.

[Alexion Pharmaceuticals Inc.](#) breached multiple provisions of the 2018 sale agreement that provided for payments of up to \$800 million based on post-deal triggers, a Delaware judge ruled. The company owes \$130 million to Syntimmune's former investors for refusing to pay after reaching the first milestone, plus an additional undetermined amount for ending the drug trials before they could hit other targets, the judge found.

Vice Chancellor [Morgan T. Zurn](#) said in a dense 139-page opinion that the results of a Phase I trial of the monoclonal antibody, ALXN1830, satisfied the first post-deal payment condition. Wading through reams of technical pharmacological data, she rejected Alexion's claim that the agreement required subsequent Phase II studies before the \$130 million could come due.

The judge also concluded that Alexion breached another provision—calling for “commercially reasonable efforts” to bring the drug to market—when it used safety concerns as a pretext to stop developing ALXN1830 shortly after its \$39 billion sale to AstraZeneca in 2021. The Phase I trial showed only “a hypothetical risk,” Zurn wrote, saying the rational next step would have been to collect more data.

“All of this naturally gives rise to the question of why Alexion would terminate a program that it once believed in,” she said. “The preponderance of the evidence supports the conclusion that the decision was influenced, motivated by, or driven by AstraZeneca's pursuit of merger synergies.”

The choice stemmed from a “full portfolio review” Alexion launched in an effort to satisfy the British

pharmaceutical giant's promise that it would find \$500 million in synergies, Zurn found. But she punted on how much in damages to tack on for breaches of the commercially-reasonably-efforts provision, asking the two sides to submit arguments on how to measure them.

The judge also declined to rule on several other claims, including a counterclaim by Alexion, saying they'll be "addressed in an opinion to come."

The Syntimmune ex-shareholders, who sued through a litigation representative, are represented by Quinn Emanuel Urquhart & Sullivan LLP. Alexion is represented by Wilks Law LLC and Arnold & Porter Kaye Scholer LLP.

The case is [S'holder Rep. Servs. LLC v. Alexion Pharms. Inc.](#) , Del. Ch., No. 2020-1069, 9/5/24 .

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

J&J's \$9 billion talc bankruptcy: Good for plaintiffs, if not their lawyers



legalnewsline.com/stories/664028062-j-j-s-9-billion-talc-bankruptcy-good-for-plaintiffs-if-not-their-lawyers

September 5, 2024

Johnson & Johnson has proposed, for the third time, a simple deal for plaintiffs claiming its cosmetic talcum powder gave them cancer: File a claim in bankruptcy court, and get a check for up to \$200,000.

The main opposition to this plan comes from a major plaintiffs firm that says it can get more for its clients in court. But that ignores the reality that tens of thousands of plaintiffs would have to wait decades for the already clogged court system to hear their cases. The alternative of getting their day in court doesn't exist in the real world, and Johnson & Johnson has won many of the trials that have already happened anyway.

Even academic critics of some bankruptcy tactics agree a court-mandated payout plan like the one J&J has proposed may be superior to trying to resolve thousands of individual claims in litigation.

When lawyers flood the airwaves with advertisements seeking clients for a mass tort, like they've done with products like Roundup and talc, they get so many potential claimants that the normal litigation system breaks down.

The prospect of driving a company into liquidation inspires a "race to the courthouse" that "can destroy going concern value and lead to the dismemberment of valuable firms," wrote University of Chicago Law School Professor Anthony Casey and Joshua Macey of Yale law in a 2023 article.

"When a firm is unable to pay all its tort claims, claimants who file early, or who find themselves before a sympathetic jury, or whose injuries happen to manifest quickly, may receive a large payout," they wrote in "In Defense of Chapter 11 for Mass Torts." "Late claimants risk being left with nothing."

Johnson & Johnson found itself in this situation after plaintiff lawyers hired scientific experts who claimed to find asbestos contamination in cosmetic talc. Johnson & Johnson denies there was any asbestos in its talc products, but enough judges have allowed plaintiff experts to testify in court that juries have delivered unpredictable and sometime huge verdicts, including \$4.7 billion – since reduced to \$2.1 billion – a Missouri jury ordered J&J to pay to 22 women with ovarian cancer.

Faced with the risk of crippling liability, J&J tried to settle talc litigation by creating a special subsidiary called LTL Management and placing it in bankruptcy in 2021, with a promise from the parent company to pay up to \$60 billion to settle claims. The Third Circuit Court of Appeals threw that bankruptcy out, ruling J&J's rich guarantee meant LTL wasn't in financial distress.

J&J tried again by reducing its commitment to \$30 billion but that was rejected as well. Now the company has proposed a third attempt with the support of lawyers representing more than 75% of ovarian-cancer talc claimants.

The plan would pay \$9 billion over 25 years, but it is opposed by Beasley Allen, a Texas law firm that says the proposal doesn't pay enough.

"For now, we are continuing to fight for our clients and if J&J chooses the bankruptcy route for the third time, we will oppose it and we believe the company will fail," Beasley Allen partner told Reuters when J&J announced the support of other plaintiff firms last month.

The alternative could be worse, wrote Casey and Macey. Assume 10% of the 70,000 or so talc claims produce jury awards averaging \$10 million apiece, not unrealistic despite J&J's winning record in court.

A 10% success rate in court would saddle J&J with \$70 billion in liabilities, enough to cripple its otherwise profitable consumer-products business.

With the company spending \$1 billion or more a year on legal fees to defend such cases, and plaintiff lawyers taking 40% of the awards, the litigation costs alone would be staggering. The results also would be unfair, "with some victims getting nothing and others getting hundreds of millions," Casey and Macey wrote.

Bankruptcy also allows a court to require money to be set aside for future claimants, something plaintiff lawyers hungry for fees in the present tend to overlook. Given virtually every adult in America has likely been exposed to cosmetic talc and plaintiff experts claim even tiny exposures can cause cancer, there will be tens of thousands of people with claims that are every bit as deserving – if plaintiff claims are to be taken seriously -- as the ones lawyers are pressing now.

The U.S. Supreme Court delivered a curveball to J&J's strategy this year in by striking down agreements that previously allowed non-bankrupt parties to buy their way out of mass-tort liability by putting money into a company's bankruptcy plan. The opinion by Justice Neal Gorsuch ruled Purdue Pharma couldn't protect the founding Sackler family from opioid lawsuits in exchange for \$6 billion in bankruptcy funding, unless all opioid claimants agreed.

This contrasts with the treatment other creditors get in bankruptcy, where a judge can “cram down” a settlement with only majority approval.

Justice Brett Kavanaugh dissented, joined by Chief Justice John Roberts, saying the decision will only make it harder for tort claimants to receive compensation. Chapter 11 bankruptcy law has mechanisms for dealing with holdouts like Beasley Allen who can otherwise derail an orderly process for paying claims, the dissenters said.

“Outside of bankruptcy,” Kavanaugh wrote, victims face “significant administrative costs” of multidistrict litigation, “which has limited coordination mechanisms and no tools for binding future claimants.”

On its third try, J&J hopes to obtain consent from enough ovarian cancer claimants to approve its prepackaged bankruptcy plan. A group of plaintiff firms including the Miller Law Firm and Keller Postman have signed off on the agreement and pledged to put it to their clients for a vote.

As with other mass-tort bankruptcies, they would presumably keep a significant portion of any payouts as fees, but administrative and defense costs would be far lower and payments would be equal among plaintiffs with similar claims.

The deal doesn't include mesothelioma plaintiffs, whose claims are far fewer but command much higher market values. Johnson & Johnson will have to negotiate those settlements separately.

ORGANIZATIONS IN THIS STORY

Beasley Allen

Johnson & Johnson adds \$1.1 billion to proposed talc settlement

 [reuters.com/business/healthcare-pharmaceuticals/johnson-johnson-wins-over-longtime-holdout-talc-settlement-wsj-reports-2024-09-04](https://www.reuters.com/business/healthcare-pharmaceuticals/johnson-johnson-wins-over-longtime-holdout-talc-settlement-wsj-reports-2024-09-04)

Mike Spector, Dietrich Knauth

- Settlement to exceed \$9 billion over 25 years
- J&J subsidiary to declare bankruptcy to finalize settlement
- Some lawyers remain opposed to J&J's plan

Sept 4 (Reuters) - Johnson & Johnson (JNJ.N) , opens new tab plans to pay an additional \$1.1 billion to resolve tens of thousands of legal actions alleging its baby powder and other talc products caused cancer, two people familiar with the matter said.

The increase would boost the size of the settlement to more than \$9 billion paid over 25 years. J&J on Wednesday said it reached an agreement with a plaintiffs' lawyer representing 12,000 clients to recommend the settlement offer to them, adding to support already received from other claimants.

The healthcare giant is preparing to have a subsidiary declare bankruptcy to finalize the proposed settlement before the end of this month, one of the people said. J&J would continue operating without filing for Chapter 11. The company maintains its talc products are safe and do not cause cancer.

The timing of a bankruptcy filing could change depending on how the counting of additional votes unfolds.

J&J said Allen Smith, the plaintiffs' lawyer now supporting its plan, agreed to the settlement offer in exchange for "additional monetary and non-monetary benefits for all talc claimants" in a bankruptcy plan it expects a judge to later approve.

J&J declined to comment on the amount of additional money it plans to pay and did not respond to an inquiry regarding the timetable for a subsidiary filing for bankruptcy protection.

The company earlier this summer gave talc claimants until July 26 to vote on its proposed bankruptcy settlement. In August, J&J allowed claimants additional time at the request of plaintiffs' lawyers including Smith, the company said.

J&J's current settlement offer is "the best and most realistic option available for claimants to recover for their claims in a timely manner," Smith said in a J&J news release Wednesday.

A Johnson & Johnson banner is displayed on the front of the New York Stock Exchange (NYSE) in New York City, in New York City, U.S., December 5, 2023. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

With votes from Smith's clients, J&J expects to garner support from more than 75% of claimants alleging the company's talc sickened them. Support from 75% of claimants is the legally required threshold for a judge to approve the kind of bankruptcy settlement J&J has proposed. The additional votes will put J&J "well above" that bar, the company said.

J&J faces talc lawsuits from more than 62,000 plaintiffs, according to a company filing. But the figure swells as high as 100,000 when counting claimants who haven't sued, Erik Haas, J&J's global vice president of litigation, has said.

Some lawyers representing cancer victims oppose J&J's plan to resolve the litigation and are locked in a bitter battle with the company.

Andy Birchfield, one of the leading opponents, said his law firm shares representation of a "substantial number" of clients with Smith through a joint agreement. Those clients have already "overwhelmingly rejected" J&J's settlement offer and Birchfield will continue opposing the company's bankruptcy plan alongside other attorneys, he said.

J&J has previously described its settlement offer as having a net present value of about \$6.48 billion with the amount of actual cash paid over 25 years totaling \$8 billion. The increased payout J&J is planning raises the latter figure above \$9 billion.

After being rebuffed twice by federal courts, J&J is attempting again to end the talc litigation in a so-called "Texas two-step" bankruptcy.

The two-step maneuver involves offloading its talc liability onto a newly created subsidiary, which then declares Chapter 11. The goal is to use the proceeding to force all claimants into one settlement without requiring J&J to file bankruptcy itself.

J&J's latest settlement offer addresses allegations talc caused ovarian and other gynecological cancers, which are the bulk of the claims J&J faces.

It excludes other claims, including those from plaintiffs alleging asbestos-laced talc caused their mesothelioma, a deadly cancer that attacks a thin layer of tissue that covers many internal organs. J&J says its talc does not contain asbestos.

Keep up with the latest medical breakthroughs and healthcare trends with the Reuters Health Rounds newsletter. [Sign up here.](#)

Reporting by Mike Spector and Dietrich Knauth in New York and Sriparna Roy in Bengaluru; Editing by Shinjini Ganguli, Bill Berkrot, Marguerita Choy and Lincoln Feast.

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Mike Spector
Thomson Reuters

Mike Spector is an Investigative Reporter for Reuters' legal team. He strives to pursue special reports and other enterprising and exclusive stories that expose wrongdoing, highlight threats to consumers and illuminate how ordinary people are affected by the decisions of judges and lawyers across the United States. His stories often involve corporate crises linked to bankruptcy proceedings, mass tort litigation and government investigations. He was the first journalist to expose Johnson and Johnson's plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder and other cosmetic talc products caused cancer. A series he led explaining how companies and nonprofits use the bankruptcy system to evade lawsuits over sexual abuse and deadly products received the Deadline Club's Daniel Pearl Award for Investigative Reporting. He has also investigated pervasive secrecy in American courts that covers up evidence of deadly products and allegations from Black women that chemical hair relaxers sold by large cosmetics companies caused cancer. He previously worked at The Wall Street Journal covering bankruptcy, private equity, mergers and acquisitions and the automotive industry.

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PROFILE

Attorney of the Year Finalist: Laura Posner of Cohen Milstein Sellers & Toll

A partner at Cohen Milstein, Posner has recovered billions on behalf of defrauded investors. Her cases include six of the top 100 securities fraud class action settlements of all time.

September 05, 2024 at 09:00 AM



Emily Saul



A courtroom sketch from *In re Walt Disney Co. Derivative Litigation* hangs on the wall in Laura Posner’s office in lower Manhattan.

The work, drawn by Andrea and Shirley Shepherd in the Delaware Court of Chancery nearly 20 years ago, was Posner’s first-ever case—and trial.

Posner, representing the plaintiffs, alleged that a \$140 million severance payout to outgoing Disney president Michael Ovitz was a waste of assets and constituted various breaches of contractual and fiduciary duties.

“It was an extremely difficult trial,” Posner recalled. “It was a veritable who’s who of Big Law in the courthouse for the defendants every single day.”

While the defense had dozens of bold-faced legal names, Posner said her team typically had two people at bat daily, switching off to prep the witnesses for the next day.

Posner recounted the case to the New York Law Journal in response to a question about her first win in the courtroom. But she didn’t win that case.

“I think it was a 70-page decision,” she said. “If you read 69 of those pages,...you would have thought we won. And then you get to the last page, and we lost.”

“It was a very hard blow,” she explained. “It’s never fun to lose, but it was a hard blow because I firmly believe that what the Disney company did was not appropriate, that it was corporate waste and that it should have been the kind of behavior that corporations are not supposed to engage in to the detriment of their investors and shareholders.”

Impact Litigation

But in the decades since, Posner has recovered billions on behalf of defrauded investors. Her cases include six of the top 100 securities fraud class action settlements of all time. Last year, she settled *In Re Wells Fargo* for a historic \$1 billion.

But those who know her have made clear she's driven not by money or rankings, but by true passion to affect meaningful outcomes for the greater good.

Prior to joining Cohen Milstein Sellers & Toll in 2017 as a partner, Posner served as the Bureau Chief for New Jersey's Bureau of Securities—the top securities enforcer and regulator in the state.

Chad Johnson, now a partner at Robbins Geller Rudman & Dowd, worked with Posner at Bernstein Litowitz Berger & Grossman. He also served as her counterpart in New York during the same period Posner was securities regulator for NJ.

"She knows the law and the cases cold," Johnson said. "But beyond that, she brings to all these cases a level of passion and commitment that is something unique. She's always looking for new ways to advance cases in the interest of the public."

"And in the private sector you just don't see that everyday," he added.

Posner grew up in the Bay Area, completing her undergraduate degree at UCLA (magna cum laude) and then earning her J.D. from Harvard Law School.

She then moved to New York, and still lives in Manhattan with her husband, who works in education, and their young son.

Posner went to law school thinking she would go into civil rights litigation at the Department of Justice.

But when it came time, the DOJ under the then-new George W. Bush administration wasn't prioritizing that kind of work, Posner recalled. She tried non-profits, but found that a lot of the job was not as legal as she might have hoped. For example, fixing a broken copier.

"I had a professor who introduced me to the world of plaintiffs class action firms," she said, referencing Harvard Law's Jon D. Hanson. "I was really interested in the kind of impact litigation, a lot of which was getting farmed out on the nonprofit stage, to other firms to litigate."

She began as a summer associate at Millberg, later returning as an associate. And there she discovered the impact of shareholder derivative litigation.

"Along the way I came to a kind of realization that ensuring that people have a financial ability that withstands the ups and downs of life, they have to have a secure retirement," Posner shared. "That people having the money to pay for everyday necessities was absolutely as crucial to ensuring everyone had equal rights in this country as anything else."

Capt. Sean Coffey is now general counsel for the U.S. Navy, but he clearly recalls when Posner arrived at Bernstein Litowitz in the early 2000s. A senior partner then, Coffey said it was clear that the new hire "was a future leader of the plaintiffs bar."

"She had a great sense of humor and a really great bullshit detector," he said. "She didn't put up with nonsense, in a good way."

"She had outstanding judgment, just smart as a whip," Coffey continued. "She plays well with others, she's a very good leader. People gravitate toward her when she offers an opinion. We're talking 20 years ago now, the smartest people in

the room would stop and listen when she contributed.”

These days, Coffey said he’d be loath to go toe-to-toe with Posner.

“I wouldn’t want to grapple with her in court unless she was sitting next to me at the same table,” he said.

Keeping the Market Safe

Posner said one of the things she appreciates about securities litigation is how demanding it is. She likes the high standards involved in motion practice and the challenges created by evolution in the laws.

She sees similarities between civil rights work and the shareholder derivative litigation she’s involved in now.

Asked to share her proudest accomplishments, Posner noted a series of post-#MeToo cases that she feels were instrumental in forcing corporations to address sexual and racial discrimination.

In 2019, she was part of a team at Cohen Milstein that secured a settlement in *In re Wynn Resorts*, which remains the only derivative case to survive a demand futility challenge based on racial or sexual misconduct allegations. Wynn settled for \$41 million in cash and \$49 million in agreed upon corporate governance reforms.

In 2022, Posner helped trailblaze novel shareholder derivative litigation against the boards of directors of both Pinterest and Victoria’s Secret (L Brands).

Those actions led to management changes and \$140 million committed to DE&I-related funding.

“I’m proud of certain cases for different reasons,” she said. “With respect to the #MeToo derivative cases, those felt very meaningful in terms of our ability to bring real corporate governance reform to these companies – everything from how they hire, to what pictures you see when you sign into Pinterest or the advertising you see at Victoria’s Secret.”

Posner also nodded to her lauded \$1 billion Wells Fargo settlement.

“I think that was really important because it dealt with how banks deal with consumer issues,” she said. “So it wasn’t just the misrepresentations or omissions to shareholders – which are obviously really problematic – but it dealt with the history of the Wells Fargo consumer fraud scandals.”

Laura Gilson is currently the general counsel at the Arkansas Public Employees Retirement System.

Gilson met Posner when Gilson was at the Arkansas Teacher Retirement System. Posner represented plaintiffs in a putative class action against Schering-Plough.

“She is extremely knowledgeable and she is extremely thorough and trustworthy,” Gilson said of Posner. “That is essential in securities litigation, that you have the confidence—if you’re going to move forward as lead plaintiff—that this is the case that will help clean the market and that your pension fund will be proud to have led the way.”

Posner goes the extra mile to ensure her clients have all the information they need to make the right decision for their pension fund, Gilson said.

“If the money’s good but she doesn’t think it fits the focus of the pension fund, she’ll say so,” Gilson explained. “That’s the kind of advice I’m looking for. We’re all just trying to take our turn in keeping the market clean, and we want to make sure we’re the best suited to represent the class.”

These days, Posner says she’s been spending a lot of time on spoofing and other market manipulation cases as well as litigation involving auditor liability.

“I think holding auditors to account for their gatekeeping responsibilities is a really important part of keeping the market safe,” she said. “Investors care greatly and rely really heavily on auditors doing their jobs effectively.”

Asked if she has any advice for young lawyers, Posner said it was essential that people find something they really love to do.

“We work a lot of hours, we work really hard,” she said. “Finding something you believe in is critical.”

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Attorney of the Year Finalist: Michael Canty of Labaton Keller Sucharow

A former Assistant U.S. Attorney known for his knack of “eyeballing fraud” when he sees it, Labaton Keller Sucharow partner Michael Canty brings...

September 05, 2024 at 09:00 AM



Katharine Lee



A former Assistant U.S. Attorney known for his knack of “eyeballing fraud” when he sees it, Labaton Keller Sucharow partner Michael Canty brings a prosecutor’s perspective to securities fraud and data privacy cases.

One group of plaintiffs found themselves in good hands last September, when Canty closed a \$90 million settlement against insurance giant Allstate. The class action suit alleged that Allstate implemented an aggressive growth strategy, including lowering its underwriting standards, to grow its auto insurance business.

The six-year case required the extensive discovery of nearly 300,000 pages of documents and 35 depositions during trial, according to Labaton.

Confidential witnesses also stated that they “knew the quality of the business was going to go down and the loss ratio was going to be outrageous,” the Allstate lawsuit said—words Canty has heard from investors before.

Prior to private practice at Labaton Keller Sucharow, where he heads the Securities Litigations Teams, Canty spent six years as a federal prosecutor in the Eastern District of New York trying defendants like “Ponzi princess” Laurie Schneider and business lender CEO John Murphy.

The former prosecutor said that his experience with the US Attorney’s office taught him how to gauge jury responses during trial and “know fraud when [he] sees it.”

“Sometimes, the best way to explain things comes from victims,” he said. “When we talk about shareholder fraud, it’s not simply money. It’s pension systems, it’s retirement systems. Behind the money are our values and ideas on where we wanted to spend that money as support.”

Labaton partner Carol Villegas, a past nominee for the Law Journal’s Attorney of the Year award who worked with Canty on the Allstate case, described Canty as a “straight shooter” that the “defense bar both respects and fears.”

“On paper, Mike is a former AUSA. Defendants know he is capable of taking the case to trial, which means they’re going to be likely to settle for a better number,” Villegas said.

Canty currently leads a number of Labaton Keller Sucharow’s high-profile securities cases. Fintech business Fidelity Information Services is on his radar, following Fidelity’s fraudulent scheme to prop up the value of private banking company Worldpay, despite failing to secure a \$48 billion acquisition of the company. Beauty conglomerate The Estee Lauder Companies faces claims that the company made false and misleading statements about so-called “gray market” reselling practices in Asia.

And Okta, an identity and access management company, is accused of lying to investors about its post-acquisition of Auth0, a customer identity cloud, among others.

Canty recently won multi-million settlements against pharmaceutical and biotech companies, alleging misleading statements surrounding the production and marketing of the drug Solaris as well as a COVID-19 vaccine candidate.

And beyond settlements, Canty prevailed in the U.S Court of Appeals for the Ninth Circuit, vacating an order that had stayed proceedings in a case against California utility company PG&E—whose material misrepresentations about the maintenance of electricity transmissions and state compliances allegedly caused the Northern Californian wildfires in 2017—for over a year.

Canty serves as the head of Labaton Keller Sucharow’s Consumer Protection and Data Privacy Practice. He currently represents clients against Flo Health on claims that the sexual health app is sharing private medical information with Big Tech, and against Amazon on claims that devices operating Alexa technology violate federal and state wiretapping charges.

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<https://www.wsj.com/finance/bank-of-america-shared-nonpublic-information-with-investors-in-india-whistleblower-says-8e16deb8>

EXCLUSIVE**MARKETS & FINANCE**

Bank of America Shared Nonpublic Information With Investors in India, Whistleblower Says

Bank is investigating complaint, which centers on three deals since 2023

By [Alexander Saeedy](#) [Follow](#)

Sept. 5, 2024 2:07 pm ET



Bank of America's Asia headquarters in Mumbai. PHOTO: DHIRAJ SINGH/BLOOMBERG NEWS

Bank of America **BAC -0.09%** ▼ has opened an internal investigation following allegations that bankers in Asia shared nonpublic information with investors before the bank sold hundreds of millions of dollars of stock.

The whistleblower complaint alleged that bankers shared transaction details with investors before a stock sale in India was announced this spring, according to a copy of the complaint reviewed by The Wall Street Journal—potentially

enabling the investors to engage in what is known on Wall Street as “front running.”

Sharing nonpublic information ahead of a major sale of publicly traded stock is illegal in many countries because it can give the recipients an advantage over others. Investors with advance knowledge could “front run” bets on how shares would perform and profit if the market moved as predicted. The practice is illegal in India, and sharing nonpublic information about deals is prohibited under Bank of America’s policies.

Company records shared with the Journal showed that bankers in Asia contacted investors in March ahead of the deal cited in the whistleblower complaint, a roughly \$200 million sale of stock for a subsidiary of Indian conglomerate Aditya Birla and financial firm Sun Life. People familiar with the sale said that bankers contacted investors via WhatsApp to share details of the transaction before it was announced.

A Bank of America spokesman said, “We take complaints seriously and thoroughly investigate them. At this time we have not found anything to support these allegations.”

The whistleblower’s complaint, filed in June, also cited separate concerns about the bank’s conduct in a roughly \$500 million initial public offering of stock for SoftBank-backed retailer FirstCry and a \$300 million rights offering for Carlyle-backed housing company PNB Housing Finance, according to the complaint reviewed by the Journal.

The bank has retained British law firm Clifford Chance and Indian firm J. Sagar & Associates to investigate the whistleblower complaint, people familiar with the investigation said. Lawyers from the firms have recently interviewed senior and junior bankers involved in the transactions, the people said.

Company records reviewed by The Wall Street Journal show that ahead of the \$200 million public sale of stock for Aditya Birla, bankers sought meetings with investors including quantitative-trading firm Jane Street, Norges Bank and life-insurance company HDFC Life. The sale was announced on March 18 and completed around March 20.

Many of the firms declined to, or didn't, respond, but HDFC Life met with bankers and company executives to discuss the terms of the stock sale around a week before the sale occurred, the people said. The meetings with HDFC Life were set up via WhatsApp, the people added.

The bankers also kept unofficial records of the communications and meetings that took place but didn't report them on the official roadshow system for the deal, the people said.

Large trades of stock for corporate clients in India are a large source of revenue for Bank of America's investment-banking franchise in Asia, bankers working there said.

Bankers on the \$200 million transaction filed a memorandum in early March to Bank of America's equity commitment council, which evaluates whether prospective deals are in line with the risk requirements of the bank. The bankers said, "there will be no deal roadshows or deal-related meetings related to this deal," according to a copy of the memorandum reviewed by the Journal.

Bank of America's internal policies state that "deal roadshows or one-on-one deal related meetings must not be conducted" for public stock sales, according to the memorandum. The bank mandates a "cooling-off" period of two-to-four weeks if bankers speak for any reason to investors that might participate in the deal, according to a copy of the memorandum seen by the Journal.

Banks have paid fines to settle allegations that they improperly shared information with investors ahead of stock sales. In January, Morgan Stanley paid \$249 million in the U.S. to settle criminal and regulatory investigations into allegations that some employees improperly shared information about clients' stock sales.

Write to Alexander Saeedy at alexander.saeedy@wsj.com

Videos

Matt Levine's Money Stuff: Some Stocks Always Go Up 5%

By Matt Levine 2024-09-05T14:20:17551-04:00

Order collaring

Let's say that you are a market maker and you trade a bunch of small, dumb, thinly traded stocks. The last trade in Amalgamated Cannabis & AI Inc. was 20 minutes ago; someone bought 100 shares for \$4 each. There has been no news since then. You have to quote a price at which you would sell 100 more shares of Amalgamated. What price should you quote?

There is, weirdly, an answer. The answer is \$4.20. The way you compute the answer is (1) you take the price of the last trade (\$4) and (2) you add 5%. Why is this the answer? Well:

- Robinhood Markets Inc. is a retail broker that, uh, sends you a disproportionate number of your orders to buy small, dumb, thinly traded stocks.
- It is fairly common behavior for a retail customer to go to the app, go to the screen for Amalgamated Cannabis & AI Inc., and put in a market order to buy 100 shares. (A market order is an order to buy 100 shares at the best price Robinhood can get.)
- Because market orders are dangerous — what if the price spikes up to \$69 for glitch or fat-finger reasons? — Robinhood, like some other retail brokers, automatically converts these market orders into limit orders.
- Specifically, the limit is up 5% from the last trade.
- So when someone goes on the app and says “buy me 100 shares of Amalgamated, I don't care about the price,” Robinhood translates that into “buy 100 shares of Amalgamated at a price of no more than \$4.20.”
- So you sell at \$4.20.

If you offered \$4.21, the Robinhood customers wouldn't be able to trade with you. If you offered \$4.19, you'd be leaving money on the table.

This analysis is not really correct — if other market makers are competing to trade Amalgamated, you

might have to offer it at a lower price — and it tells you nothing at all about the price you should offer, like, Nvidia at. For a big actively traded stock, there will be enough competition that Robinhood's up-5% anchor doesn't matter at all. But for after-hours trading of a small retail stock, this actually turns out to be a surprisingly useful heuristic:

Order collaring, which automatically converts default market orders into limit orders with a 5% spread over prior prices, has been used at Robinhood to protect retail investors from trading at unfavorable prices. However, in this paper, we provide empirical evidence that this policy actually harms retail traders by increasing their trading costs. Through quasi-experiments involving Robinhood's trading hours, their extension, the discontinuity around the 5% spread, and the asymmetric implementation of order collaring on retail buy and sell orders, we find that retail traders on Robinhood face higher spreads. Specifically, during regular trading hours, their collared orders execute at an additional spread of 4.2 basis points, and in extended hours, a significant number of their orders execute precisely at the 5% spread over closing prices. Furthermore, our analysis of the GameStop short-squeeze episode reveals that the order collaring policy is associated with extreme price movements in stocks.

That's the abstract to "[Democratizing or Demoralizing: The Impact of Robinhood's Order Types on Retail Trading Costs](#)," by Preston Mantel and Mehmet Saglam. From the paper:

In addition, we examine how prices exhibit extreme volatility due to the presence of the order collaring policy at 5%. Since retail traders are subject to excessive spreads up to 5% on each trade, correlated retail trading on Robinhood (e.g., successive retail buys) may cause sudden price movements as strategic market makers know that their default orders will be converted to limit orders priced at a 5% differential over the prior transaction prices. Consequently, the order collaring policy can cause extreme price volatility as observed on meme stocks that are traded heavily by retail investors.

The current explanation of the unprecedented price volatility observed in January 2021 is primarily based on a short-squeeze theory. In their report, the SEC found that short covering, however, did not make up the majority of buying pressure for the duration of the GameStop (GME) price runup. We investigate whether the order collaring policy could have also played a substantial role in these extreme price movements. Computing maximum and minimum transaction prices around the closure of Robinhood, we find consistent evidence suggesting that the order collaring policy is potentially introducing extreme volatility to the observed prices.

The intuition is something like this:

- 1. Imagine that the only buyers of a stock are price-insensitive Robinhood customers putting in market orders, which convert into orders to buy for no more than 5% above the last trade.
- 2. Imagine that the only *sellers* of the stock are gleeful ruthless electronic trading firms who know Fact 1.
- 3. If the first retail buyer buys the stock at \$100, the *next* retail buyer is going to buy it at \$104.99, the one after that is going to pay \$110.23, etc.

This is not really right — a real market will include price-sensitive buyers, fundamental sellers, and competition among market makers to win business, so prices can't really go up 5% on each trade — but it does seem like it might be part of what is going on.

Efficiency

In possibly related news, here is a fun paper by Cliff Asness on [“The Less-Efficient Market Hypothesis,”](#) whose basic points are:

- 1. It's harder to be a value investor: “The ratio of the valuation (using whatever measure you favor) of expensive stocks to cheap stocks” has been higher, in recent years, than its historical average, so if you are in the business of buying the cheap stocks you have not had a good run.
- 2. This is an indication of market inefficiency: If the expensive stocks are really expensive, that's probably because they are in a bubble, not because they have become much more valuable relative to the cheap stocks.
- 3. Why is this happening? Possibly some combination of low interest rates, increased indexing and more meme-driven retail investors.

The first point seems relatively straightforward. The second seems more debatable, and you could tell stories about how actually today's high-priced stocks *should* be worth a lot more than the low-priced stocks, though Asness has answers to some of the big ones.

But my favorite is the third point, possible explanations for why the highest-price stocks might be irrationally high in modern markets. Asness points to indexing:

Imagine some fraction of the market passively hold the index and the rest are active traders/investors trying to outperform. Now divide this active group in two (this is the obnoxious part). One group are sharks, the other minnows. Minnows make bad decisions based on emotion, story, tastes that are not relevant for risk and return, and behavioral biases. Sharks outperform by taking the other side of the minnows' misguided positions. Well, if indexing has grown, whether this has made markets more or less efficient comes down to whether more sharks or more minnows moved to indexing. If more sharks have moved, the remaining sharks should have an easier time making money over the long term as there is less competition in betting against the minnows, but the minnows have more influence than they used to at the short to medium term. Prices are a dollar-weighted average of opinions, and if a larger fraction of this is misguided, so will be prices. Given that indexing is by definition smart for the average investor to do, and given the celebrated "death of value investing" and concomitant shrinking of value investors' assets and influence, I find it very easy to believe more sharks have moved to indexing than minnows, making the market more subject to the wild valuation spreads we've documented here. But it ain't close to a proof (sorry, there won't be any of those).

My intuition is the opposite: I would think that clever professionals would continue to trade actively, while uninformed retail investors would react to the rise of indexing by putting all their money into index funds. But his story is plausible; it would go something like this:

- 1. It used to be that retail investors mostly handed their money to mutual funds, where professional investors tried to pick the best stocks. Or they handed their money to wise financial advisers, who also tried to buy them the best stocks. And then some retail investors traded their own accounts badly.
- 2. Now, the first group instead hand their money to index funds, which don't try to pick the best stocks. And the second group hand their money to wise financial advisers, who do the wise thing and put them in index funds. And then the third group continue to trade their own accounts badly.

That is, the model is that the smart retail investors used to give their money to smart professionals, and now they index instead. And the dumb retail investors are still dumb retail investors.

But dumber, because of memes:

Has there ever been a better vehicle for turning a wise, independent crowd into a coordinated clueless even dangerous mob than social media? Instantaneous, gamified, cheap, 24-hour trading now including "one-day funds" (Greifeld 2024) on your smartphone after getting all your biases

reinforced by exhortations on social media from randos and grifters with vaguely not-safe-for-work (NSFW) pseudonyms filtered and delivered to you by those companies' algorithms which famously push people to further and further extremes. What could possibly go wrong?

I don't think we are quite there yet — I write a lot about sophisticated multistrategy hedge funds that make market-neutral stock bets to push prices in more efficient directions and rigorously measure their production of alpha! — but a market that consisted only of index funds and meme-stock investors would be pretty wild.

Earnouts

Sometimes a big company wants to buy a little company with a promising but unproven technology. If the technology works out, the big company will make a lot of money with it; if not, not. Often these deals will be structured with an earnout: The acquirer will pay some cash for the target at closing, but will also promise to pay it *more* cash, later, if the technology works out and makes a lot of money. The target's shareholders get some certainty at closing, but they also share in the upside of their technology; the acquirer gets some hedge against the risk that the technology doesn't work out.

There is an obvious problem with this: Before the acquisition, the target was a scrappy startup working as hard as possible to develop its promising technology. The odds were long, but it had the right team in place and everyone was hungry and motivated. After the acquisition, the target is a division of a giant corporation with a lot of bureaucracy, and all of its key employees are rich. Is it possible that their chances of building the technology will go down?

Also, if you are a shareholder of the target company, you might worry that the acquirer will hold up progress on the technology, in order to avoid paying the earnout. "If we commercialize this technology, we will have to pay the target's shareholders another \$1 billion, so let's not," the acquirer might think. In general you'd hope this wouldn't happen — the point of the deal is for the acquirer to make a ton of money from the technology, and pay a portion of it to the target shareholders in the earnout, so incentives are aligned — but at the margin I suppose the earnout could hurt.

One other worry: What if the acquirer doesn't want the target's product, but just wants to raid it for parts? What if the acquirer is already building some competing technology, and wants to buy the target just to help with that effort? The acquirer gets some patents, some employees, some ideas, and uses them to build its own product, shutting down the target's competing product. The acquirer

makes a lot of money from the deal, but doesn't have to share any of it in the earnout, because the target itself goes nowhere under the acquirer's control.

This is all stuff you can think about and try to write into the contract, but it's all risky, and it can be hard to be very specific in advance. At Axios, [Dan Primack reports](#):

Johnson & Johnson broke its promises to investors in Auris Health, a surgical robotics startup it bought five years ago for \$3.4 billion. Now it's got to shell out another \$1 billion, based on a ruling yesterday from Delaware Chancery Court. ...

This appears to be the largest legal reward ever granted in an investor earnout dispute, and could change the way that such provisions are written.

Here is [the opinion](#), by Delaware Vice Chancellor Lori Will. The story is that Auris had two surgical robots that J&J wanted (Monarch and iPlatform), though J&J was working on its own surgical robot (named Verb). But, the judge writes, "Verb was falling increasingly behind the schedule J&J had announced to the market, despite J&J's colossal investments," and J&J worried that a competitor might buy Auris. So J&J decided to buy Auris instead, and they agreed to a deal with \$3.4 billion up front and up to \$2.35 billion in earnouts dependent on (1) getting various regulatory approvals for Monarch and iPlatform and (2) reaching net sales milestones.

And then they didn't hit those targets. In part this was because the US Food and Drug Administration changed its approval processes for these robots, which made it harder to hit the regulatory milestones. But in part it was because "instead of providing efforts and resources to achieve the regulatory milestones, J&J thrust iPlatform into a head-to-head faceoff against Verb." And although iPlatform won the faceoff, "progress toward iPlatform's regulatory milestones ceased while technical debt from shortcuts in its development amassed." And then everything got sort of mashed together:

On December 5, 2019, J&J management recommended to the J&J Board that the company proceed with "a combined platform where Auris' iPlatform is augmented by Verb assets including the open surgeon console, intra-procedure data capabilities and the surgeon portal." The combination robot, called "iPlatform+," was described as a "[n]ext generation robotic platform designed with more flexibility, more control, and more information to elevate [the] surgeon experience [and] improve patient care." ...

Afterward, J&J worked to integrate Verb's resources into Auris. The Auris leadership team was

largely sidelined. A “[f]ull [s]peed [m]igration” of more than “200 [Verb] employees” to the iPlatform team commenced. A calamity of excess and redundancy resulted. Hostility abounded between the two factions, which had just faced off in Project Manhattan for the survival of their respective projects. J&J soon announced layoffs on both teams.

Within a year of the integration, every engineer from legacy Auris’s iPlatform clinical engineering team left the company—a “devastating” loss for the program. Meanwhile, Verb software engineers insisted on re-writing iPlatform’s code. Significant attrition of legacy Auris software engineers followed.

“By the end of 2021, iPlatform was shelved,” and the earnout milestones were written down to zero. The former Auris shareholders sued, arguing that the merger agreement required J&J to use its “commercially reasonable efforts” to develop Auris’s technologies consistent with its “usual practice” for a “priority medical advice,” and that it didn’t do that. The judge agreed:

Instead of being prioritized, J&J subjected iPlatform to efforts that impaired its development and ability to secure planned clearances. J&J’s efforts benefitted another device— Verb—at iPlatform’s expense. It is obvious from the record that J&J’s efforts toward the iPlatform regulatory milestones were not commercially reasonable, as defined in the Merger Agreement. J&J’s breaches are, instead, reasonably certain to have caused iPlatform to miss its regulatory milestones.

It is hard to write merger agreements. They are sort of like prenups: When you are *negotiating* the merger agreement, everyone loves one another and is excited about their union, and you don’t want to think too hard about what might go wrong. Here, Auris was going to get a pile of money, and J&J was going to get some robots that it thought would *make* it an even bigger pile of money. Everyone’s interests were aligned, and it would have been rude to make very specific demands about how J&J developed iPlatform. “We’re all in this together, and it’s going to make us rich,” is the basic thinking, so the contract is not particularly clear about what would happen if that changed.

Venture Global

Maybe my favorite company in the world these days is Venture Global LNG Inc., which is an innovator in liquefied natural gas production and contract interpretation and general smugness. We have talked about Venture Global a few times before; the basic story is:

- 1. Venture Global was a startup that wanted to build a liquefied natural gas plant.
- 2. To raise the money to do this, they signed long-term fixed-price supply contracts with big energy companies, committing them to deliver LNG to those companies once the plant was up and running.
- 3. They got the money, built the plant and started producing LNG in early 2022.
- 4. Also in early 2022, though, Russia invaded Ukraine and the price of LNG shot up.
- 5. Rather than sell the LNG to the big energy companies at the contracted prices, Venture Global would prefer to sell it on the spot market at much higher prices.
- 6. So it has been doing that, for two and a half years.

The rationale for this is that, while the plant absolutely *is* producing and selling lots of LNG, it “has yet to enter commercial operations,” because, I don’t know, there’s some problem with the power supply or something. It is an extremely technical quibble, but the contract says that it has to start fulfilling the contracts when the plant is in commercial operation, and that weirdly keeps not happening. I once joked that the problem is that they haven’t painted one last rivet, “and then they say ‘oops, still not finished, see, unpainted rivet,’ and keep selling LNG at high prices to spot buyers.”

Anyway I love them in part because this is a hilarious trade but mostly because, every time there is a news story about it, (1) they still haven’t painted that rivet and (2) they give a comment that is essentially “nyah nyah nyah nyah nyah.” Here’s [the Financial Times with the latest](#). The story is always the same — the contracted customers keep complaining, going to arbitration, and not getting their gas — but look at this quote:

“Due to our ability to produce first LNG during construction we have been uniquely positioned to bring more incremental molecules into the market which lowers prices, not raises them,” the spokeswoman said. “Venture Global is honouring its contractual obligations to its long-term customers in strict conformity with its long-term contracts.”

“Honouring its contractual obligations to its long-term customers in strict conformity with its long-term contracts” means “you will absolutely never get us to paint that rivet.”

Private credit trading

Sure I mean of course:

Apollo Global Management Inc. is planning to build out a secondary trading desk for private debt provided by a handful of lenders, according to people with knowledge of the matter who asked not to be identified as the details are private.

Plans are preliminary and Apollo may decide to not pursue them, the people added. An Apollo representative declined to comment.

The big asset manager would follow some others in the \$1.7 trillion private credit industry that have set up operations to buy and sell the illiquid loans. Golub Capital has been trading direct loans, having bought and sold about \$1 billion the first half of this year.

“My basic theory of private credit,” I once wrote, “is that (1) it’s kind of a new thing but (2) it will quickly be absorbed into the old things.” Part of the initial idea of private credit was that lenders could get a premium in exchange for taking illiquidity risk. But wouldn’t it be nicer to *also* have liquidity?

Basis trade

I mentioned yesterday that one way to characterize the basis trade is that “pension funds want to get their duration via Treasury futures, and Treasury wants to sell bonds, so hedge funds intermediate that trade by buying the bonds, using them to manufacture futures, and collecting a spread.” That is not quite right. It’s pretty close, but actually the big users of the basis trade seem to be mutual funds. Here’s a June Federal Reserve discussion paper on “[Reaching for Duration and Leverage in the Treasury Market](#),” by Daniel Barth, R. Jay Kahn, Phillip Monin and Oleg Sokolinskiy:

We show substantial variation in mutual funds’ use of Treasury futures, both over time and across funds. This variation from mutual funds drives much of the time series variation in aggregate Treasury futures open interest, including over 60% of the recent rise in Treasury futures positions. We provide evidence these Treasury futures positions are largely attributable to mutual funds “reaching for duration” in order to track the duration of a benchmark index with high cash Treasury exposure. Specifically, we show mutual funds use futures to fill the gap between their portfolio and the index that results when they tilt their cash positions toward higher return but lower duration assets, such as mortgage-backed securities and equities, and away from cash Treasuries. Treasury futures positions are more common in mutual funds which indicate a focus on dual objectives of duration management and total return whose style has a higher allocation to Treasuries. Reaching for duration allows funds to track their index better at lower cost, but increases leverage in the Treasury market both through

mutual funds long Treasury futures positions and through the leverage of hedge funds who take the corresponding short positions in Treasury futures.

The broader point remains that there are fundamental investors who want to own Treasury futures, the US government wants to sell Treasury *bonds*, and the service of buying the bonds and transforming them into futures is largely done by basis-trading hedge funds.

Fyre II

A running theme of this column is that it is good, for your financial career, to lose a billion dollars: It proves that you are a confident risk-taker, that people liked you enough to trust you with their money, and that you have learned some lessons about *not* losing the next billion dollars. I mean, it suggests that last part. It's not proof. Another possibility is that you are just the kind of person who is very good at charming people into trusting you with a billion dollars and then immediately losing it. This is not a perfect signal. It is a *fun* signal, though. The interpretation is something like "people are mean reverting, and nobody who had that sort of disaster would do it again." Some people are not like that, though, and having a disaster only makes them hungrier for another disaster.

Anyway:

Billy McFarland is a little over a year into planning Fyre Festival II, and he still doesn't know where it's going to be. Or when. Or who's performing. But he says it's definitely happening. One hundred percent, absolutely for-sure happening.

After all, he's already sold tickets.

"I shouldn't talk in absolutes, but I will here," McFarland says between sips of a matcha latte on a sweltering June day. "Fyre II *has* to work."

Fyre I was so bad that McFarland spent four years in prison for it: He sold tickets to a luxury concert experience, and then didn't deliver the performers or food or venue or anything else that he promised. This time, though, he has learned important lessons and won't sell tickets until he has made sure he can get the ... oh wait sorry never mind he's already sold tickets, I'm sure it's still fine though.

Things happen

Biden Prepares to [Block \\$14 Billion Steel Deal](#). Verizon Strikes \$9.6 Billion Deal for [Frontier](#). BNY seeks growth in investment services with [managed account deal](#). New Mountain Merger to Create \$3 Billion Medical Payments Firm. Ford, Coors Light and Other Brands Retreat From a [Gay-Rights Index](#). Robby Starbuck: the activist pushing US companies to ditch their [DEI vows](#). Ghana's Bondholders Back \$13 Billion Restructure Exchange Offer. Ex-Discover Star Sues Over Pay Clawback Before \$35 Billion Deal. Three former [Wirecard](#) executives found personally liable for €140mn. How Local Governments Got Hooked on One Company's Janky Software. I'm at the combination [casino/water park](#).

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To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

- 1. It also doesn't tell you how to make a two-sided market in Amalgamated, that is, what price you should bid to *buy* it. The Mantel and Saglam [paper](#) points out that Robinhood doesn't appear to convert market *sell* orders into down-5% limit orders, so conceivably your market in Amalgamated could be like \$0.01 bid / \$4.20 offered, though that would be rude.
- 2. This model is too simple — eventually the electronic trading firms will want to lay off some of the risk by buying back some of the stock they sold, so pushing up the price is risky for them — but it is a workable toy model if you assume that the effects are all temporary and they can safely buy it back tomorrow at \$100.
- 3. [Byrne Hobart](#): "But you can also tell a story where the quality of companies has gone up, in ways that don't fit the quality factor but that do make them worth more. In fact, one particular marker of quality among big growth companies—the willingness to dump vast amounts of capital or opportunity cost into new priorities and to ride out the attendant lower margins and investor complaints—will make those companies screen worse on statistical measures of quality but make them economically better, more durable companies."
- 4. E.g.: "We looked at whether these very wide value spreads were only a function of technology stocks, in which case perhaps (perhaps!) you might argue for a special case. They weren't. We

looked at whether the famous critique of 'value doesn't account for intangibles' was driving things. It only (barely) mattered at the margins. We looked at whether a handful of super-expensive, super-mega-cap stocks were the problem (first the 'FANGs', today likely the 'Magnificent Seven'). Nope. We looked at whether value was 'more short' attractive factors like gross profitability and return-on-assets (ROA), possibly indicating that while value spreads were wider, they were somehow more rationally wide this time. They weren't." And in footnote 34: "Historically on average more-expensive stocks do grow more going forward (this coefficient is usually positive and certainly strongly averages so). This doesn't make expensive stocks a good deal. They are supposed to grow more, and value's long-term success shows that high-multiple stocks are usually priced to need even more excess growth than they deliver. Put simply, this relationship seems very steady over time. We do not see a strengthening of this relationship where over time higher priced stocks consistently deliver even more excess earnings growth than in the past. If we did see that we'd have to consider whether that was another way today's value spread might be more 'rational' than in the past, even at wider levels. But it didn't happen."

- 5. That's a cite to Katie Greifeld's story on leverage exchange-traded funds that we discussed the other day.

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Wirecard AG**Three former Wirecard executives found personally liable for €140mn**

Munich court rules Markus Braun and others violated duties over loans to suspicious businesses



From left, Susanne Steidl, Markus Braun and Alexander von Knoop © Wirecard Handout/Reuters

Olaf Storbeck in Choranche, France 8 HOURS AGO



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Former Wirecard boss Markus Braun and two other executives have been ordered to pay €140mn plus interest in damages to the defunct payment group's administrator over violations of professional duties.

In a long-running civil suit brought by Wirecard administrator Michael Jaffé, Braun, former chief financial officer Alexander von Knoop and former chief product officer Susanne Steidl have been found personally liable for losses from unsecured loans to allegedly fraudulent business partners in Asia.

[Wirecard](#) collapsed into insolvency in 2020 after disclosing that half of its revenue and €1.9bn in cash did not exist. Braun has been in police custody for more than three years and is facing a criminal trial that is still ongoing. Von Knoop and Steidl were [charged with breach of trust](#) last month but were not remanded in custody.

The management decisions at the heart of the civil trial in Munich underpin a small fraction of the alleged misconduct at Wirecard, once hailed as one of the country's most successful fintechs and at its peak valued at more than €24bn on the stock market.

The administrator's claim for damages focuses on potentially fraudulent loans to suspicious business partners in Asia, which on paper were generating a big chunk of Wirecard's revenue and profits.

In March 2020, just months before the German firm's collapse, Wirecard forked out €100mn in unsecured loans to one of the purported outsourcing partners in Singapore, the Financial Times has previously reported. That payment used the bulk of Wirecard's remaining liquidity at the time. Some €35mn of the cash was channelled back to [Braun](#) who used it to repay a personal loan he had taken from Wirecard bank.

The court found that Wirecard's executive board violated its professional duties as it did not insist on any collateral for the €100mn, even though the recipient of the loan had been in arrears before. The court said that the board's decision was "untenable and at odds with the duty of care of a prudent businessman".

According to the judgment, which is not yet legally binding under German law as it can still be appealed, the executive board also violated its professional duties when it decided to purchase securitised bonds from the same Asian business partner that later proved worthless. The board had ignored internal advice to conduct proper due diligence before agreeing to the transaction, according to the judgment.

The court ruled that the three former executives are personally liable for the financial fallout from those transactions, which it calculated as €140mn plus 5 per cent interest per year. Since Wirecard's insolvency more than four years ago, compound interest added up to more than €30mn, according to FT calculations.

Before the insolvency, Braun's shares in Wirecard were worth more than €1bn. He also owned luxury property in Austria, Germany and France. But his personal wealth has been seized by prosecutors, and earlier this year, his former lawyer [Alfred Dierlamm resigned](#) because Braun was unable to pay his legal fees after the funds of his directors and officers' liability insurance ran out.

A lawyer for Braun said that they will evaluate the ruling and then decide whether to file an appeal.

The Munich court ruled that Wirecard's former deputy chair Stefan Klestil, who had also been sued by the administrator over the matter, is not required to pay damages over the decisions to the administrator.

"Today's decision is an important step. It highlights that supervisory boards are ultimately powerless when, as in the case of Wirecard, executives choose not to follow the rules and deliberately bypass the board," said a spokesperson for Klestil.

Spokespeople for Steidl and the administrator declined to comment. A lawyer for von Knoop did not immediately respond to requests for comment.

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Trump Media's 69% Plunge Wipes Out Billions Before Lockups End

By Bailey Lipschultz2024-09-05T10:57:41878-04:00

- Shares fall in 22 of last 27 sessions, losing 46% of value
- Trump's personal profit from deal takes \$3.7 billion haircut

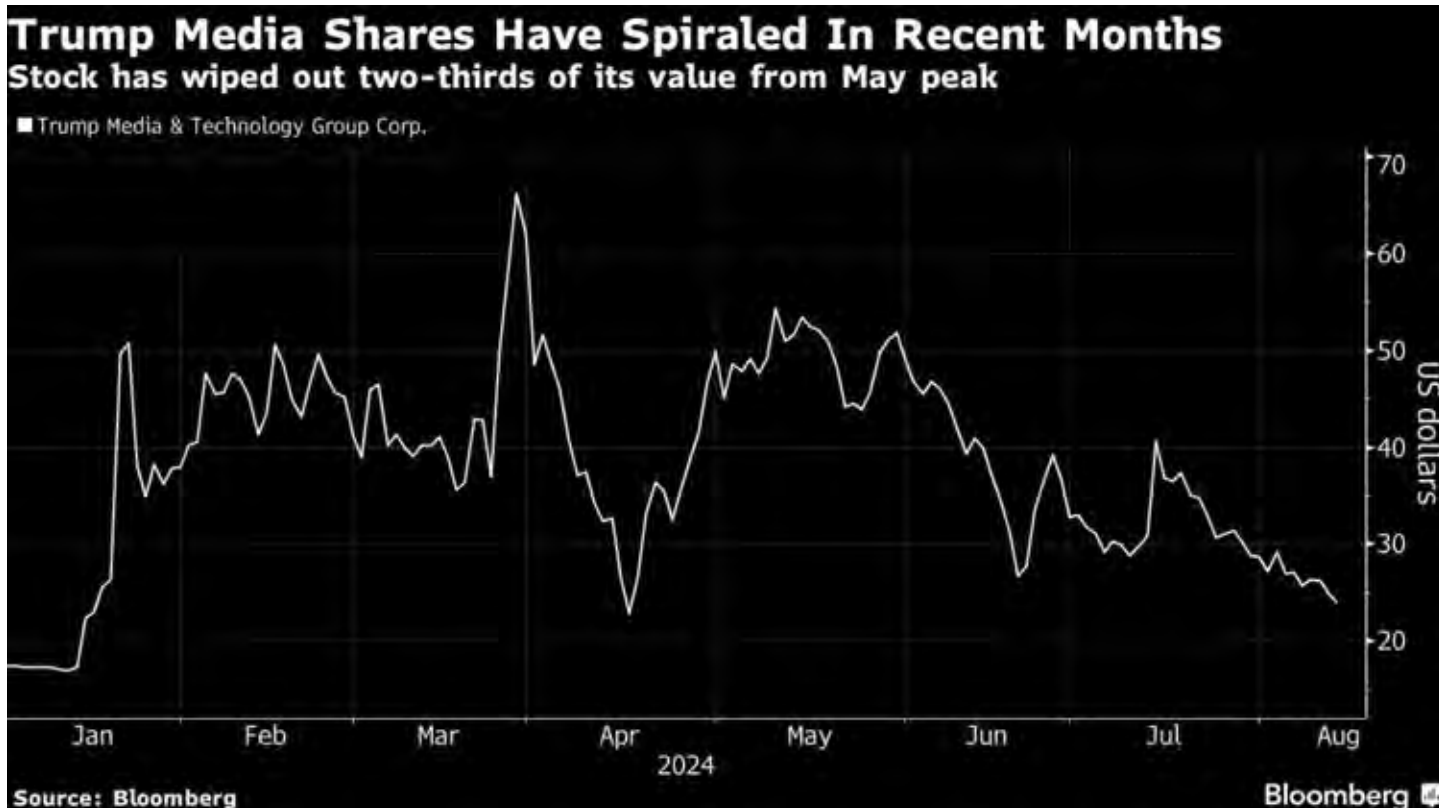
The stock price of Donald Trump's media company is sinking just as the lockup period from its blank-check deal is about to end, potentially flooding a saturated market with even more shares.

Trump Media & Technology Group Corp., which was worth nearly \$10 billion in mid-May, has fallen 69% since its market capitalization peaked on May 9 and is now worth less than \$3.4 billion. The selloff has accelerated in the past month, with the shares falling in 22 of the 27 sessions through Wednesday's close and losing more than 45% in the process. That pressure is only expected to increase when the deal lockup expires as soon as Sept. 19 and insiders can start unloading their equity.

The spiral is happening as retail traders grapple with the Republican presidential candidate's return to X after using his own platform for years. In addition, Trump's opponent, Vice President Kamala Harris, is showing momentum in recent polls. Real Clear Politics has Trump polling at 46.2 nationally down from a high of 48.1 on July 29, while Harris is up to 48.1 from 46.2 when President Joe Biden dropped out of the campaign.

Read more: Harris-Powell Double Act Leads to Unwind of 'Trump Trades'

For Trump, the stumble wipes out more than \$3.7 billion from the former president's paper profit off the deal, falling from a high of almost \$5.8 billion to roughly \$2 billion. And it delivers over \$200 million in paper profits to short sellers who've bet against the company since its July 15 peak, data from analytics firm S3 Partners show.



The stock, which trades under Trump's initials and went public in March through a blank-check merger, is now below where the special-purpose acquisition company traded at before Trump's success in the Iowa caucuses in January kickstarted a 193% surge in just six sessions.

"Anybody who looks at this knows that the current price of the stock has no relationship to the underlying value of the company," said Brian Quinn, a law professor at Boston College. "Until recently it's been nothing more than a financial indicator of MAGA loyalty."

Even with the selloff, Wall Street still sees Trump Media's valuation as lofty considering it lost more than \$16 million in the second quarter while delivering less than \$1 million in revenue. It has struggled to establish a modest user base, according to third-party trackers, while Trump's return to his preferred mouthpiece, X, has busted the bull thesis some investors had pitched.

Read more: [Trump Is About to Get the All-Clear to Cash In on Media Shares](#)

Of course, the volatility isn't new for the stock, which has climbed as high as \$79.38 in its debut and is trading around \$17 now, an all-time low for the public company. That degree of price gyrations makes some speculative corners of the market look like ports in the storm by comparison. Take Bitcoin, which has a 30-day realized volatility of around 44. For Trump's company that figure's about 70.

Indeed, since mid-January Trump Media has seen wider price swings than the highly volatile cryptocurrency.



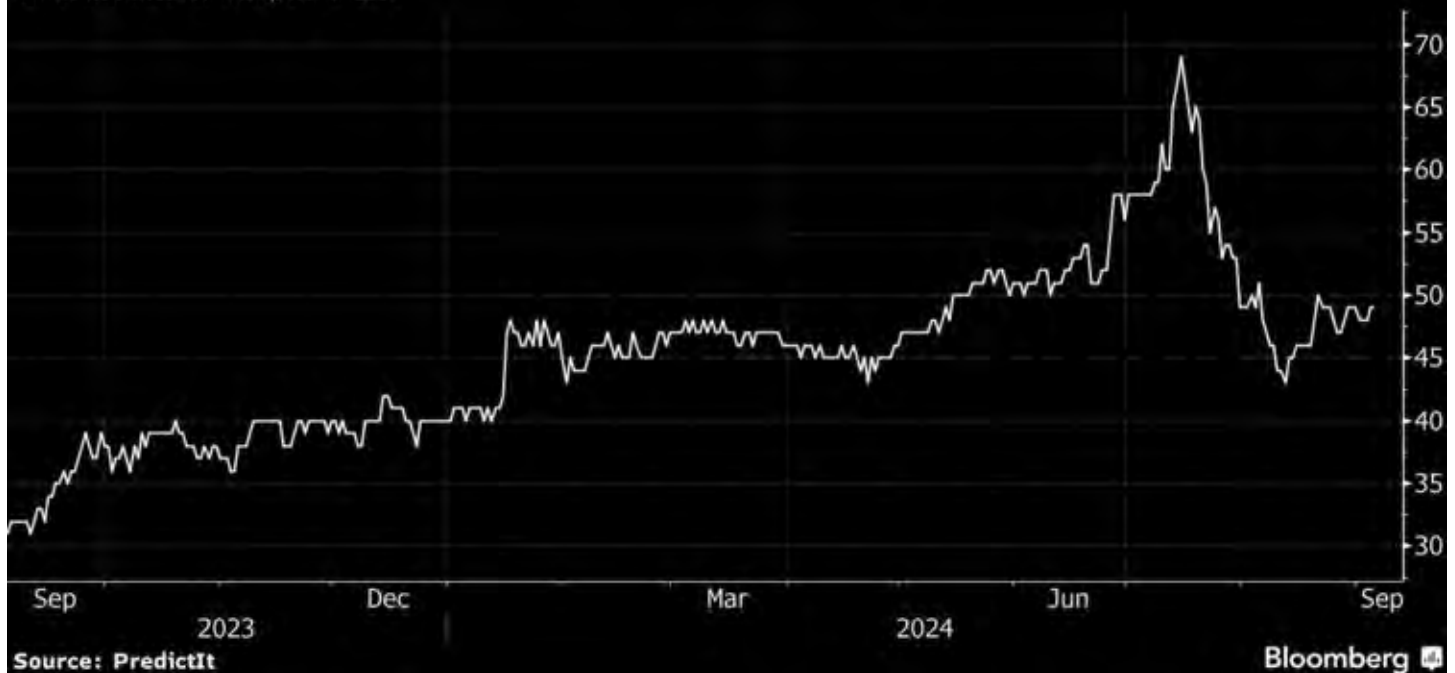
The stock is on pace to fall for a seventh-straight week with Trump and other insiders able to start selling shares this month. That potential pressure could extend the latest decline, though industry watchers agree that it won't be easy for Trump to extract billions in cash.

"It's going to be very difficult for him to dump his shares" given restrictions on how quickly Trump can sell down his stake and the appropriate regulatory filings that are required, said Quinn.

The stock's decline from a near-term peak in mid-July in the wake of the failed assassination attempt attempt against the former president at a Pennsylvania rally has been similar to the sinking betting odds that Trump will win in November, according to PredictIt.

Trump's Betting Odds Have Peeled Back Global gamblers see return to White House as a coin flip

■ PredictIt Odds for Trump Win in 2024



It is illegal for US sportsbooks to set odds on American elections. But offshore gambling sites can take those bets, so there's active wagering globally on the outcome of the vote. Bettors give Trump a 48% chance of winning, up from 43% on Aug. 12 but well below the peak at 69% on July 15 shortly after the assassination attempt, according to PredictIt data as of 10:54 a.m. in New York. But they give Democrat Harris a 53% chance of winning, up from 13% on July 15, PredictIt data show.

--With assistance from **Elena Popina**.

To contact the reporter on this story:

Bailey Lipschultz in New York at blipschultz@bloomberg.net

To contact the editors responsible for this story:

Jeremy Herron at jherron8@bloomberg.net

Eric J. Weiner, Elena Popina

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'Investors are growing anxious': Truth Social stock plummet has all eyes on Trump's wallet

 [rawstory.com/trumps-truth-social-media-2669135190](https://www.rawstory.com/trumps-truth-social-media-2669135190)

Kathleen Culliton

September 5, 2024



A Truth Social screen. (Shutterstock.com)

Former President Donald Trump's eponymous media company's plummeting stock prices erased all the year's gain as its investors worry the financially strapped candidate and convicted felon might soon cash out his shares, according to a new financial analysis.

Standard and Poor's 500 — an index tracking 500 of the largest publicly traded companies — rose 16 percent over a six-month stretch that saw Trump Media shares tumble from a \$79.38 high on March 26 to just \$17 Wednesday, when stock dropped 6 percent, Fortune reported.

"Trump's financial situation appears strained," the Fortune analysis stated. "Trump is nearing the day he can cash out of Truth Social's parent company, raising concerns of a potential sell-off that could hit the meme stock hard."

Trump's 59 percent stake in the company is valued at \$1.95 billion, but he cannot sell his 115 million shares until six months after his agreement with Digital World Acquisition Company (DWAC) on March 25, Fortune reported.

That end date is raising concerns about the future of Trump Media, which had lost 80 percent of its value as of Wednesday, as Trump faces a tightening race against Vice President Kamala Harris, mounting legal fees, according to the analysis.

"Investors are growing anxious," Fortune reports. "The loss-making social media company is trading at over 1,000 times its annual revenue. Sales for the first half of the year were just \$1.6 million, with deeply negative cash flow."

The analysis warns Trump Media stock could continue to decline after CEO Devin Nunes and CFO Philip Juhan sold off \$2.5 million worth of shares.

Trump Media attracts little interest from professional investors and Wall Street analysts who avoid "meme stock" companies that don't publish key metrics, the Fortune report stated.

The increasingly close election season has spelled trouble for Truth Social, Trump's social media platform and the company's primary asset, according to the Fortune analysis.

"Trump has now been forced to return to Twitter (now X), where he has ten times as many followers and a far larger audience, in order to reach potential voters," the report stated.

"Should he lose in November...Truth Social's importance going forward would be greatly diminished since Trump's political career would likely be over."



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Virgin Galactic Investor Says Branson, Brass Hid Safety Risks

By **Hannah Albarazi**

Law360 (September 4, 2024, 9:22 PM EDT) -- A Virgin Galactic stockholder sued the aerospace and space tourism company's founder Richard Branson and top executives in Delaware's Court of Chancery, alleging the billionaire profited by selling off equity at an inflated price while failing to publicly disclose his knowledge of purportedly pervasive safety issues.

Investor Kimberley Espinosa filed a verified stockholder derivative **complaint** Tuesday, on behalf of nominal defendant Virgin Galactic Holdings Inc., and lodged claims for breach of fiduciary duty and unjust enrichment against Branson and company directors. She accused Branson of unloading his shares in the company while he and the Virgin Galactic top brass kept shareholders in the dark about safety issues.

"Branson profited from his misconduct and was unjustly enriched through his exploitation of material and adverse inside information," Espinosa wrote in the partially redacted complaint.

She also said, "As the public slowly learned that the aircraft the company operates are unsafe, Virgin Galactic's stock crashed and stockholders have lost almost all of their investment."

A Virgin Galactic spokesperson told Law360 in an email Wednesday that the "allegations are entirely without merit, and we will address them in the appropriate forum."

The investor's complaint contains information gathered from, among other sources, her review of the books and records produced by Virgin Galactic in response to her demand under Section 220 of the Delaware General Corporation Law, she noted.

Espinoza said that after the company was founded in 2004, Virgin Galactic's test flights "were unsuccessful" and "repeatedly resulted in tragedy or near tragedy."

She added that Virgin Galactic, a Delaware corporation with its principal place of business in California, has faced safety problems throughout its entire existence and laid out what she described as major failures and near-misses over the years.

Another company that was contracted to perform Virgin Galactic's flight tests, Scaled Composites, narrowly avoided an accident in 2011 "when the aircraft went into an inverted spin and the pilots, through extraordinary efforts, regained control of the craft," according to the lawsuit.

Roughly three years later, during a 2014 flight, "an accident killed one pilot, severely injured another, and disintegrated the aircraft," Espinoza said. During a test flight in 2018, "experienced test pilots found themselves in an uncontrolled spin thirty miles above earth before they miraculously regained control of the aircraft," after which defects were discovered and "required months to repair," the complaint said.

In February 2019, a crew "narrowly escaped another catastrophic event when their aircraft sustained damage due to an adhesive bond coming apart," the shareholder alleged.

"Despite the near misses, loss of life, and questionable safety record, Branson was determined to be the first billionaire in space," Espinosa said. "He was particularly intent on beating rival Jeff Bezos and Bezos' company Blue Origin into space."

When Virgin Galactic went public on Oct. 25, 2019, through a reverse merger with a special purpose acquisition company, Social Capital Hedosophia Holdings Corp., Branson was the aerospace company's controlling stockholder, the suit noted.

"Rather than providing the market with correct information, Branson used his knowledge of Virgin Galactic's [material nonpublic information] as motivation, at least in part, to sell his personal holdings while the company's stock was artificially inflated. Branson was privy to [material nonpublic information] about the company's true business health," the complaint continued.

On Dec. 14, 2020, the Virgin Galactic stock took a major hit when the company disclosed during premarket hours that one of its rocket systems failed to activate during a test flight earlier that week, according to the complaint.

The suit also takes issue with a July 11, 2021, test flight, in which Branson himself was a passenger, and which he publicly described as a "flawless" flight. According to Espinosa, Branson's statement was an effort "to falsely legitimize the safety of Virgin Galactic's aircraft."

"It was again nearly a tragedy," the investor said. "The flight experienced serious complications with its trajectory and flew well out of designated airspace, risking a crash landing far from a runway."

Complications kept occurring because Virgin Galactic's spacecraft for transporting people to space, Eve and Unity, were merely prototypes and not designed for commercial use, the complaint said.

Weeks later, before material nonpublic information regarding serious safety issues with the company's aircraft and the "near catastrophic" July 2021 flight, known as Unity 22, was disclosed to the public, on Aug. 10 and Aug. 12 that year, Branson dumped Virgin Galactic stock, Espinosa alleged.

Branson knew about Eve and Unity's defects and the problems with the July 2021 flight, but "instead of informing the public of the truth," he unloaded stock at artificially inflated prices, the suit contends.

The Federal Aviation Administration announced Sept. 2, 2021, that it was grounding Unity, causing the Virgin Galactic stock to again tumble, the investor said.

On Oct. 14, 2021, "Virgin Galactic canceled a flight and grounded Unity and Eve for more than a year" after discovering cracks "riddled" in Eve's wings and other parts, "a problem well known to Branson before it was publicly disclosed," the complaint said. According to the suit, the company's stock fell again after this.

Espinosa demanded on Dec. 6, 2022, that Virgin Galactic's board of directors initiate action against Branson on behalf of the company, but the board refused to take action, she said.

"As a result of these improprieties, Virgin Galactic disseminated improper public statements concerning Eve's and Unity's structural defects and the flawed Unity 22 flight," the investor told the court. "These improper statements have devastated Virgin Galactic's credibility as reflected by the company's almost \$9 billion, or 64%, market capitalization loss from a high of \$59.41 per share on February 11, 2021, to \$20.10 per share on October 15, 2021."

Espinosa is seeking restitution from Branson and seeks a court order for disgorgement of all profits, benefits and other compensation obtained by the founder, accusing him of wrongful conduct and breaching fiduciary duties.

Attorneys representing the shareholder did not immediately respond to Law360's requests for comment Wednesday.

Espinosa is represented by Christopher H. Lyons and Tayler D. Bolton of Robbins Geller Rudman & Dowd LLP and Brian J. Robbins, George C. Aguilar and Michael J. Nicoud of Robbins LLP.

Counsel information for the defendants was not available Wednesday.

The case is Espinosa v. Branson et al., case number 2024-0895, in the Court of Chancery of the State of Delaware

--Editing by Covey Son.

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Apollo Defends \$570M Controller Deal In Chancery Suit

By **Jeff Montgomery**

Law360 (September 4, 2024, 7:23 PM EDT) -- An attorney for Apollo Global Management Inc. pushed back Wednesday in Delaware's Court of Chancery on stockholder claims that former company chairman and former CEO Leon Black and two others dominated the business in the runup to a \$570 million payout to the three insiders in 2021.

During arguments on dismissal of a suit seeking controller and board disgorgement of the cash and other penalties, Scott B. Luftglass of Fried Frank Harris Shriver & Jacobson LLP, counsel for Apollo, its controllers and directors, argued that a company special committee fairly negotiated the \$570 million tax receivable agreement and other terms with Black and two others in connection with a corporate restructuring.

Apollo's corporate growth, however, became entangled with Black's private interactions with Jeffrey Epstein, a financier who died in a New York jail cell in August 2019 while awaiting trial on allegations of sex trafficking and conspiracy to traffic minors for sex. He had previously pled guilty to state charges in Florida

"A big background fact for their case is the situational pressure, that Black seemingly had to leave" control of Apollo, Vice Chancellor J. Travis Laster told Luftglass.

"Their [stockholder] pitch is that, if all you were focusing on was the dynamic, then yeah, they gave up something real, particularly control. But that's not the game," the vice chancellor said. "The game is that Black already had to leave because of the onrushing scandal, and therefore this was a situation where that part of the deal was done," with Black's alleged "leverage" in negotiations over the size of a tax receivable agreement diminished.

Luftglass told the vice chancellor that "there are plenty of different ways one could have negotiated some kind of exit for Black that would have fallen short of going from 90% control to a 28% share."

The stockholders, Luftglass said, would "have you believe that the co-founders of Apollo had a gun to their heads. They had to give it all up and accept nothing." But it was an "integrated transaction," with the three controllers giving up higher-voting shares in exchange for the \$570 million.

Joel Friedlander of Friedlander & Gorris PA, counsel to Anguilla Social Security Board, plaintiff-stockholder for the direct and derivative suit, told the vice chancellor that the suit alleges breaches of the duty and waste against directors for overpaying the founders on terms not entirely fair to Apollo. Company officers were accused of fiduciary breaches alone.

Anguilla brought its suit in August 2023.

Black and founders Joshua Harris and Marc Rowan also were accused of breaching their fiduciary duties by pushing through the tax-free exchange and \$570 million payoff on unfair terms.

Friedlander told the vice chancellor that a conflicts committee of Apollo's board "engaged in artificial negotiations upon receipt of a rather brazen proposal from the founders."

The committee, Friedlander said, "approved a massive payment for the founders for something that Black had already committed to do, which he felt compelled to do and was in the financial best

interest of him to do as well as the other co-founders."

Friedlander said the "controlled mindset" of the Apollo's conflicts committee was demonstrated by the background of the Black Epstein scandal.

"The conflicts committee whitewashed it in a way that no one actually believed, which was Black paid Epstein \$158 million for tax and estate planning," Friedlander said.

Black himself resigned as CEO in 2021 after he was accused of sexual misconduct unrelated to the Epstein scandal.

Vice Chancellor Laster said that counsel for Apollo argued that the issues involve "a larger transaction," one that is "value moving." In focusing on part of it, the vice chancellor said, the defense argued that the complaint "loses the forest for the trees. Even if one or two trees might be somewhat rotten, the forest as a whole is a great forest and the committee is well within its judgment to approve this."

Friedlander argued that the defense was missing the forest, with events showing "how much Black and Apollo were skating on thin ice at this time."

Vice Chancellor Laster said he would consider the arguments.

Anguilla Social Security Board is represented by Joel Friedlander, Jeffrey M. Gorris and Christopher M. Foulds of Friedlander & Gorris PA and Randall J. Baron, Benny C. Goodman, Andrew W. Hutton and Christopher H. Lyons of Robbins Geller Rudman & Dowd LLP.

Apollo Global Management Inc., Leon Black, Joshua Harris, Marc Rowan and Apollo's directors are represented by Kevin R. Shannon, Matthew F. Davis and Daniel M. Rusk IV of Potter Anderson & Corroon LLP and Scott B. Luftglass, Michael P. Sternheim and Alexis R. Casamassima of Fried Frank Harris Shriver & Jacobson LLP.

The case is Anguilla Social Security Board v. Black et al., case number 2023-0846, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.



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Albertsons Denied Texas Court Remand In Opioid MDL

By **Jonathan Capriel**

Law360 (September 4, 2024, 10:08 PM EDT) -- An Ohio federal judge overseeing multidistrict litigation over accusations that drug distributors contributed to the opioid epidemic denied a motion to transfer to Texas a portion of the dispute involving pharmacy company Albertsons.

U.S. District Judge Dan Aaron Polster said Tuesday he'd like to "shoulder the burden of all MDL cases" in this sprawling litigation, which is why he must decline Albertsons Cos. Inc.'s bid to send claims against it to the Northern District of Texas.

"Albertsons supplies good reasons why the court should exercise its discretion to suggest remand now," he wrote in his order. "[But] this court is determined to shoulder the burden of all MDL cases as much as reasonably possible, thereby making any chores that necessarily remain for other federal judges as few and easy as reasonably possible."

Last Friday, the major drug distributors, including McKesson Corp., Cardinal Health Inc. and Cencora Inc., and other defendants agreed to pay a group of benefits plans \$300 million to resolve allegations that they caused the opioid crisis and in some cases exacerbated it for profit.

Other pharmacy companies and grocery store chains that operate pharmacies have agreed to settle claims, except for Albertsons.

The company has sought summary judgment on all claims that it violated the public nuisance laws of Tarrant County, Texas. But Albertsons argued that the Northern District of Texas is the best place for this motion to be heard.

Tarrant County, however, argued that the court should first decide on the public nuisance claim before sending it to Texas.

"Tarrant County's best argument is that this court is in the best position to decide summary judgment in light of the vast knowledge it has accumulated through almost seven years' experience presiding over opioid distribution and dispensing claims," the judge said.

Judge Polster said he and the Northern District of Texas are "equally able" to address issues arising out of Texas state law, but he is far more "knowledgeable" about the facts around the case, he said in his order.

Albertsons is represented by Francis Citera, Gretchen N. Miller and Linda M. Ricci of Greenberg Traurig.

The plaintiffs and Tarrant County are represented by Jayne Conroy of Simmons Hanly Conroy, Joseph F. Rice of Motley Rice LLC, and Paul T. Farrell Jr. of Farrell & Fuller LLC.

The case is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Editing by Adam LoBelia.

Update: The spelling of an Albertsons' attorney's name has been corrected.



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Ga. Justices Won't Disturb Distributors' Opioid Trial Win

By **Tom Lotshaw**

Law360 (September 4, 2024, 7:58 PM EDT) -- The Georgia Supreme Court affirmed a ruling that family members of drug abusers are not entitled to a new trial after a Glynn County jury cleared opioid distributors of wrongdoing, in response to claims regarding an allegedly dishonest juror and flawed jury instructions.

The trial, **held in 2023**, cleared the distributors, including Cardinal Health Inc., McKesson Corp. and J.M. Smith Corp., of claims that they unlawfully distributed controlled substances and failed to take appropriate steps to prevent pharmacies from filling invalid prescriptions by so-called "pill mill" doctors.

Family members pushed for a new trial shortly after the verdict, after the jury foreperson asserted a juror identified as S.T. introduced prejudicial information during deliberation and had been untruthful during the jury selection process.

According to the foreperson, S.T. told jurors that he knew one of the **drug abuser witnesses** and his family, suggested he had engaged in criminal activity with the witness and that the witness was still engaged in crime, and that "God had put him on the jury" to prevent such people from recovering from the lawsuit.

The trial court denied family members' motion for a new trial after questioning S.T., when S.T. denied knowing the witness or making the statements about him, and considering other jurors' statements asserting they did not recall S.T. making the allegedly prejudicial comments.

"Because the trial court was authorized to credit S.T.'s live testimony over the testimony provided by the foreperson by affidavit, and was likewise authorized to give more weight to the affidavit testimony of jurors D.F. and B.D., whose averments supported S.T.'s live testimony, in concluding that no extraneous prejudicial information was provided to the jury, we see no abuse of discretion in denying a new trial on this basis," Justice Carla Wong McMillian wrote in an opinion issued on Wednesday.

The justices also affirmed the trial court's decision to deny the motion for a new trial over S.T.'s alleged dishonesty during jury selection.

"Here, while appellants presented admissible evidence that they argue supports a finding that S.T. was dishonest during the selection process, any such findings of dishonesty must be made by the finder of fact after resolving any inconsistencies," the justices said, pointing to contradictory testimony that the trial court was "authorized to credit."

The justices rejected arguments that the trial court did not sufficiently investigate, noting that the court held two hearings, examined S.T., and considered affidavit testimony of other jurors as well as written and oral arguments from the parties.

"For these reasons, whatever the requirement for the inquiry is in this context, we hold that under the circumstances of this case, the court acted within its discretion in investigating the allegations of juror misconduct and that a remand for another evidentiary hearing is not required," the justices said.

They also rejected family members' argument that the trial court should have instructed the jury on willful blindness, holding that the jury was properly instructed on all the issues it had to decide.

"Moreover, appellants were permitted to argue willful blindness to the jury, as well as the evidence that appellants relied upon in attempting to prove that theory," the justices said in the opinion.

"Appellants argued repeatedly throughout their closing that the law did not permit appellees to 'turn a blind eye to suspicious circumstances,' or to 'stick [] [their] head[s] in the sand and stuff [] millions of dollars in [their] pocket[s]' while ignoring 'red flags,'" the justices added.

The opinion did not address a cross-appeal that the distributors filed challenging the constitutionality of Georgia's Drug Dealer Liability Act and liability they may face under it, in the event that justices vacated the lower judgment.

All justices concurred with the opinion except for Chief Justice Michael P. Boggs, who did not participate, and Justices Nels S.D. Peterson and Andrew A. Pinson, who disqualified.

Representatives for the parties could not immediately be reached for comment on Wednesday.

Family members are represented by Bondurant Mixson & Elmore LLP, Griffin Durham Tanner & Clarkson LLC, The Harrison Firm and Madel PA.

Distributors are represented by Baker & Hostetler LLP, Covington and Burling LLP, Fox Rothschild LLP, Hunter McLean Exley & Dunn PC and Troutman Pepper Hamilton Sanders LLP.

The cases are Joseph Poppell et al. v. Cardinal Health Inc. et al. and Cardinal Health Inc. et al. v. Joseph Poppell et al., case numbers S24A0687 and S24X0643, in the Supreme Court of Georgia.

--Editing by Vaqas Asghar.

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Icahn Enterprises Investor Sues Alleging 'Ponzi-Like' Scam

By **Dorothy Atkins**

Law360 (September 4, 2024, 9:46 PM EDT) -- An Icahn Enterprises LP investor hit the partnership's billionaire founder Carl Icahn and its board with a derivative suit in Florida federal court Tuesday, accusing them of hiding "highly significant" risks, including the partnership's alleged "Ponzi-like" structure, which purportedly inflated its price and exposed it to regulatory probes and litigation.

In a 43-page complaint, investor Harvey Gitlin accuses the 88-year-old billionaire and the top brass at Icahn Enterprises LP, which is a Sunny Isles Beach, Florida-based master limited partnership, of breaching their fiduciary obligations to investors by hiding multiple material risks that the partnership faced while lining their own pockets with alleged ill-gotten gains.

"The partnership has suffered massive losses from the waste of corporate assets as a result of the unjust enrichment of defendants who were improperly overcompensated by the partnership and/or who [benefited] from the wrongdoing alleged herein as a result of the falsely inflated financial results," the complaint says.

At its peak in December 2013, Icahn Enterprises traded on the public market at \$148.53 per unit, but the suit says its profitability has since "languished." In 2018, Icahn Enterprises was trading around \$50 per unit and around that time, the partnership began steadily issuing \$1.75 to \$2 per "depository unit" quarterly dividends, according to Gitlin's complaint.

However, by August 2018, Carl Icahn, who had served as Icahn Enterprises' chair and controlling shareholder and the CEO of its subsidiary Icahn Capital LP since 2007, incurred "massive personal margin loan indebtedness," which unbeknownst to most investors, were collateralized by his Icahn Enterprises holdings and other personal assets, the suit claims.

Carl Icahn's multibillion-dollar loan agreements required that he maintain a certain loan-to-value ratio tethered to Icahn Enterprises' per unit trading price, and despite the "highly significant and material risk" those loan agreements posed to investors, the partnership's board never disclosed them, the suit alleges.

As Carl Icahn secured more loans, Gitlin claims that the partnership used Icahn Enterprises' "heightened dividend yields" as an inducement to artificially inflate the partnership's trading price and draw more investors into the purportedly high-performing "dividend stock," the suit alleges.

"This dividend inducement scheme was aided by defendants' lack of transparency, coupled with false and misleading statements, and material omissions, to create the illusion that the partnership's significant quarterly dividends were linked to its liquidity, no matter whether the partnership had a profitable quarter or not," the suit says.

But Carl Icahn's alleged scheme came to light after Hindenburg Research published a report in May 2023, claiming that the partnership had overvalued its assets and inflated its annual net asset value by 22%, while allegedly using money taken in from new investors to pay out dividends in a "Ponzi-like economic structure," causing units to be inflated by 75%, the complaint says.

Following the report, Icahn Enterprises' unit price dropped 40% within days, and it dropped further after its quarterly financial **report revealed** that the partnership had become the target of a probe by New York federal prosecutors, according to the suit.

The report and disclosure has spurred multiple **securities lawsuits** against the partnership and its executives, which the defendants are **actively fighting**, and earlier this year, the partnership and Icahn agreed to pay \$1.5 million plus \$500,000 in civil penalties to **settle** related U.S. Securities and Exchange Commission charges.

The instant two-count complaint asserts breach of fiduciary duties in violation of the Securities and Exchange Act and related federal regulations.

The lawsuit seeks damages, attorney fees and costs, plus interest, as well as an order requiring the partnership to reform and improve Icahn Enterprises' corporate governance and internal procedures to comply with applicable laws and to protect investors from the same alleged misconduct in the future.

Gitlin's counsel and representatives for Icahn Enterprises LP didn't immediately respond to requests for comment Wednesday.

In addition to Carl Icahn, the complaint names as defendants Icahn Enterprises' Chief Financial Officer Ted Papapostolou, CEO Andrew Teno and board directors Nancy Dunlap, Denise Barton, Alvin B. Krongard, Stephen A. Mongillo and Michael Nevin.

Gitlin is represented by William B. Federman of Federman & Sherwood and Jose D. Sosa.

Counsel information for the defendants wasn't immediately available Wednesday.

The case is Harvey Gitlin v. Carl C. Icahn et al., case number 1:24-cv-23390, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Jessica Corso. Editing by Kelly Duncan.

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3M Earplug Plaintiffs Want Child Support Subpoena Blocked

By **Mike Curley**

Law360 (September 4, 2024, 5:47 PM EDT) -- The plaintiffs' leadership group representing service members and others in multidistrict litigation against 3M Co. over injuries stemming from its Combat Arms Earplugs asked a Florida federal court Wednesday to block the state of Washington Division of Child Support from interfering in the \$6 billion settlement reached earlier this year.

In a **motion** for an order to show cause, the plaintiffs said Division of Child Support, or DCS, has issued a subpoena to settlement administrator BrownGreer that seeks information on Washington state claimants that have nothing to do with child support in a "textbook example of a fishing expedition."

The settlement to resolve claims that the earplugs were defective and led to hearing loss and other injuries in its users was reached **in January**, following trial losses for 3M that cost it over \$250 million.

According to the motion, DCS mailed an administrative subpoena to BrownGreer on May 21, 2024, which did not identify any child support order under which it needed information, but instead sought a list of all claimants with a Washington state address who haven't yet received a payout, including their names, Social Security numbers and dates of birth.

Though BrownGreer said the request was too broad, DCS still responded with no identification of specific liens asserted against claimants or information about the enforceability of such a subpoena against the settlement fund, according to the motion.

Given its oversight of the MDL, the plaintiffs' leadership group said, the court has the power to block DCS from further interference in the settlement administration, and such an order is warranted because DCS is seeking to unreasonably impose on that administration by conscripting the courts and BrownGreer to do the work of identifying claimants against which DCS has liens.

Responding to the Washington agency's demands would impose undue costs on the court and BrownGreer, particularly because all Washington state claimants would need to be given notice about their private information being sought, and all claimants would share the burden of the additional administrative costs and delays to the payment of the settlement, according to the motion.

The attorneys further argued that the requested information is an unreasonable invasion of the claimants' privacy and creates unnecessary data protection risks.

In addition, the court's orders already require claimants' attorneys to disclose to BrownGreer whether the award is subject to nonmedical liens, including child support.

If DCS is aware of any liens, it can give notice of any specific liens directly to the claimant's counsel or BrownGreer, or exercise its normal regulatory authority to compel a debtor to take necessary actions, the attorneys added, so a subpoena like this is not necessary.

"DCS has provided no authority to support its assertion that the court's agent should bear the burden of assisting DCS in its fishing expedition," the plaintiffs' attorneys said. "DCS should show cause as to why DCS should not be enjoined from imposing such burdens."

The Washington Division of Child Support declined to comment on Wednesday. Representatives for the other parties could not immediately be reached for comment.

The service members are represented in the MDL by Aylstock Witkin Kreis & Overholtz PLLC, Clark Love & Hutson PLLC and Seeger Weiss LLP, among others.

3M is represented by Jay Bhimani, Allison K. Ozurovich, Matthew P. Steinberg and Craig J. Castiglia of Dechert LLP and Charles F. Beall Jr. and Larry Hill of Moore Hill & Westmoreland PA.

Counsel information for the Washington Division of Child Support was not available Thursday.

The case is In re: 3M Combat Arms Earplug Products Liability Litigation, case number 3:19-md-02885, in the U.S. District Court for the Northern District of Florida.

--Additional reporting by Jonathan Capriel and Emily Field. Editing by Rich Mills.

Correction: This article previously misstated the dollar value of the MDL's settlement.

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UBS Financial Gets Wrapped Up In Cash Sweep Class Action

By **Katryna Perera**

Law360 (September 4, 2024, 9:59 PM EDT) -- UBS Financial Services has been hit with a proposed class action suit alleging it prioritized its own financial interests and those of its affiliated banks over customers by using its cash sweep program to direct customers' uninvested cash balances into accounts that disproportionately benefited the investment bank.

Andrew Davitt, a UBS customer, filed a **complaint** Tuesday against UBS on behalf of a proposed class of customers whose cash held in brokerage accounts with the investment bank was subject to UBS's bank sweep program.

According to the complaint, under the bank sweep program, UBS, acting as customers' agent and fiduciary, automatically "sweeps" uninvested cash balances in customer accounts into deposit accounts at one of UBS's subsidiary or third-party banks.

Davitt said that UBS implemented the program to offer customers an interest-paying vehicle to hold cash that offers Federal Deposit Insurance Corp. protection on those cash deposits, but in reality, UBS was using the program to obtain "outsized benefits for itself and its affiliates using its customers' cash, at the expense of plaintiff and the proposed class."

Under the program, the complaint stated that UBS has the discretion to select the banks that participate in the program, the types of accounts to which the program applies, the types of accounts into which customers' funds are swept, the interest rates paid to customers and the compensation paid to UBS and its affiliates in connection with the program.

Davitt said that, while claiming to act as an agent for customers, UBS used the program to its own benefit by taking for itself and for affiliates a vast majority of the compensation earned from customers' cash and by concealing or misrepresenting the benefits it was receiving.

"UBS's disclosures contained a multitude of material misrepresentations and omissions that inaccurately presented the terms and operation of the program to plaintiff and members of the proposed class, and thus prevented them from giving informed consent as to the program and UBS's conflicts of interests," the complaint stated.

Davitt further alleged that UBS short-changed its customers by acting as an agent "serving two masters."

"While acting as its customers' fiduciary agent vis-à-vis the establishment, maintenance, and operation of the program, UBS negotiated transactions whereby it shifted the compensation that broker-dealers like UBS customarily receive from banks in connection with cash sweep programs to the affiliated banks, instead of to its customers, to whom it owed fiduciary duties," the complaint stated.

In a statement to Law360 on Wednesday, Michael Dell'Angelo of Berger Montague PC, counsel for Davitt, said, "Individual investors have lost out on substantial interest income on their cash enrolled in sweep programs. Certain financial institutions have favored themselves to the detriment of their customers. Our clients receive only a tiny fraction of returns generated by their cash, with these financial institutions paying themselves the majority of those returns."

Another lawyer for Davitt, Alan Rosca of Rosca Scarlato, added, "We plan to hold those brokerage firms accountable and seek compensation on behalf of investors for the firms' use of their customers' cash, which we believe was improper and not in those customers' best interest."

UBS declined to comment on Wednesday.

Several other financial institutions have recently been hit with **class action suits** over their respective bank sweep programs, including JPMorgan Chase, The Charles Schwab Corp. and Raymond James.

Davitt is represented by Radha Nagamani Raghavan, Michael Dell'Angelo, Andrew D. Abramowitz and Alex B. Heller of Berger Montague PC and Alan L. Rosca, Jonathan A. Korte and Paul J. Scarlato of Rosca Scarlato LLC.

Counsel information for UBS was not immediately available.

The case is Andrew Davitt v. UBS Financial Services Inc., case number 1:24-cv-06692, in the U.S. District Court for the Southern District of New York.

--Editing by Dave Trumbore.

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J&J Hit With \$1B Damages In Del. Merger Milestone Fight

By **Jeff Montgomery**

Law360 (September 4, 2024, 1:06 PM EDT) -- Johnson & Johnson owes more than \$1 billion to a medical robotics developer and entrepreneur caught up in a multibillion-dollar post-acquisition dispute, a Delaware vice chancellor ruled Wednesday.



A Delaware vice chancellor ruled that Johnson & Johnson owes more than \$1 billion for breaching agreements in connection with its acquisition of **Auris Health**. (Photo by AaronP/Bauer-Griffin/GC Images)

In the decision, Vice Chancellor Lori W. Will found that Auris Health Inc.'s stockholders are owed for breaches of contract and of the implied covenant of good faith and fair dealing tied to milestones reached during development of Auris' iPlatform robotic surgical device.

"The bespoke earnout provision negotiated by the parties required J&J to treat iPlatform as a priority device, to provide efforts in support of the regulatory milestones, and to avoid making decisions based on the contingent payment," the vice chancellor wrote. "J&J violated each obligation — most blatantly when iPlatform was made to compete against and combine with" J&J affiliate Ethicon's own "Verb" robotic device.

J&J and Ethicon were accused of requiring a post-merger competitive "bake-off" between Ethicon's Verb and Auris' iPlatform, with Verb declared the winner and a hold on cash reserved for iPlatform milestones released in April 2020. Auris launched a 12-count suit in October 2020, alleging common law and equitable fraud, breaches of the merger agreement and the implied covenant of good faith and fair dealing, among other counts.

In a statement released Wednesday afternoon, a Johnson & Johnson spokesperson said the company was reviewing the decision and assessing appeal options.

"We respectfully disagree with the court's decision regarding our development of the iPlatform and communications with Auris regarding soft tissue ablation," Johnson & Johnson said in its statement. "Fundamentally, the court viewed our commercially reasonable contract as imposing a commercially unreasonable obligation."

In a separate ruling Wednesday, the vice chancellor denied stockholder representative Fortis Advisors' bid for roughly \$312,000 in discovery fees, instead awarding \$36,000.

Vice Chancellor Will found that J&J was liable to Fortis, as stockholder representative, for breaches of a best effort provision governing development milestones for both Auris and another system, Monarch, intended for potential lung cancer and other soft tissues.

For breaches of the merger agreement and the implied covenant of good faith and fair dealing, the vice chancellor found, Fortis sought damages tied to missed payouts for six surgical milestones, one governing general surgery and five body areas, including abdominal, urologic, gynecologic and gastrointestinal. Anticipated payments for the group would have totaled \$1.15 million.

As adjusted by a "blend" of success probabilities, the court found, damages were pegged at \$968.8 million with \$42.4 million added for interest, bringing the total to \$1.01 billion.

J&J, the vice chancellor said, argued that its agreement gave it broad discretion in use of the platform, an assertion the court found was contradicted by the agreement. In addition, J&J blamed missed milestones on iPlatform's alleged "technical problems," a response that the court described as "dubious" and "concocted after J&J was sued," despite indications that the problems were both "expected and solvable."

The vice chancellor noted that "it was only after Fortis sued in October 2020 that J&J began searching for diligence files suggesting technical flaws in iPlatform's system. This appears to be tactical backfilling."

The Auris system emerged in large part from the efforts of Dr. Frederic Moll, who was described in the opinion as having witnessed early work in the field by way of a Stanford Research Institute project funded by the U.S. Department of Defense.

Moll would go on to found Intuitive Surgical Inc., which developed the pioneering "da Vinci" robotic surgery system in the 1990s, later earning a reputation as the "father" of robot surgery during a career that led to Auris Health.

Overall, the vice chancellor found, "the record supports a finding that iPlatform would likely have met" a key general surgery milestone had J&J fulfilled its promises to Auris. Evidence, the court found, demonstrates that other milestones were likely to be met "had J&J provided commercially reasonable efforts and resources to iPlatform as a priority device."

Fortis Advisor is represented by Bradley R. Aronstam, Roger S. Stronach and Dylan T. Mockensturm of Ross Aronstam & Moritz LLP and Philippe Z. Selendy, Jennifer M. Selendy, Sean P. Baldwin and Oscar Shine of Selendy Gay PLLC.

J&J and Ethicon are represented by William M. Lafferty, Susan W. Waesco, Elizabeth A. Mullin Stoffer and Kirk C. Andersen of Morris Nichols Arsht & Tunnell LLP and Joshua A. Goldberg, Muhammad U. Faridi, Diana M. Connor and Lauren S. Potter of Patterson Belknap Webb & Tyler LLP.

The case is Fortis Advisors LLC v. Johnson & Johnson et al., case number 2020-0881, in the Court of Chancery of the State of Delaware.

--Editing by Alyssa Miller.

Update: This story has been updated with more details.